French - Re-Direct Arguments to Court

IN THE CIRCUIT COURT FOR THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

Case No. 00-01706 CA 22

LYNN FRENCH,

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A.") R.J. REYNOLDS TOBACCO COMPANY, LORILLARD TOBACCO CO., and BROWN & WILLIAMSON TOBACCO CORP., Individually and as Successor to the AMERICAN TOBACCO COMPANY,

Defendants.

----------x

PROCEEDINGS BEFORE
THE HONORABLE FREDRICKA SMITH
VOLUME 10
Tuesday, June 11, 2002
1:15 p.m. to 6:15 p.m.

73 West Flagler Street
Courtroom 6-2
Miami, Florida 33130

http://legacy.library.ucsf.edu/tid/ahm07a00/pdf
Document hosted at www.industrydocuments.ucsf.edu/docs/hmxl0001

APPEARANCES:
GROVER WEINSTEIN & TROP P.A.
7th Floor, Concord Building
66 West Flagler Street
Miami, Florida 33130
Phone: (305)377-4840
By: MARVIN WEINSTEIN, ESQ.
ADAM TROP, ESQ.
RHONDA WEINSTEIN, ESQ.
Attorneys for Plaintiff

WOMBLE CARLYLE SANDRIDGE & RICE, LLP
One West Fourth Street
Winston-Salem, North Carolina 27101
Phone: (336) 721-3549
By: JONATHAN ENGRAM, ESQ.
Attorneys for Defendant R.J. Reynolds

SHOOK, HARDY & BACON, L.L.P.
2400 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131-4332
Phone: (305) 358-5171
By: KENNETH REILLY, ESQ.
WILLIAM GERAGHTY, ESQ.
GAY TEDDER, ESQ.
Attorneys for Defendant Philip Morris Incorporated and Lorillard Tobacco Co.

ADORNO & YOSS, P.A.
2601 South Bayshore Drive, Suite 1600
Miami, Florida 33133
(305) 858-5555
BY: WILLIAM C. MCCUE, ESQ.
Attorneys for Defendant Brown & Williamson Tobacco Corp., individually and as successor to the American Tobacco Company

PROCEEDINGS

- - -

THE COURT: Have a seat, please.

Did you find the law on that subject, by the way?

MR. TROP: I have not.

THE COURT: Are we ready to go, though?

MS. WEINSTEIN: Your Honor, I need one more thing from an exhibit and I need a copy.

MR. REILLY: Judge, before we start. I don't know, you asked how long the redirect was going to be and I would only point out that the cross examination was of a very limited scope. I don't want to have a bunch of -- have to object a bunch of times to redirect that's beyond the scope of cross examination.

THE COURT: Your view of what's limited and mine might not be exactly the same. I mean, I think it covered the whole expanse of the time that the Plaintiff was working, but I'll certainly hear you on any objection.

MR. REILLY: I would agree that we covered her entire work --

THE COURT: But it just wasn't the time

that was off, it was where she was -- whatever, I'll hear your objections.

So what are we waiting for?

MS. WEINSTEIN: An exhibit.

THE COURT: Can we bring the jury in?

You can have a seat back up here.

(Jury enters courtroom.)

THE COURT: Everyone have a seat, please.

We're going to proceed with the redirect examination

REDIRECT EXAMINATION

BY MS. WEINSTEIN:

Q. Mrs. French, I'm going to start by talking about the chart that you were shown on cross examination and ask you if this is accurate.

A. Yes.

Q. 1976 you were out for the month of December?

A. Yes, it looks that way.

Q. Did you work any other months in 1976?

A. Yes, I did.

Q. What other months were you working?

A. June, July, August, September, October, November.

Q. So those months you were exposed to

secondhand smoke on airplanes?

A. Yes.

Q. So that's June through November?

A. Yes.

Q. Six months.

In 1977 there aren't any notations here. Did you work in 1977?

A. Yes, I did.

Q. A full year?

A. Yes.

Q. So you were exposed, it says here, you were not exposed 1977, but in fact, you were exposed all of 1977, right?

A. Yes, that is correct.

Q. That's January?

A. Through --

Q. Through December?

A. December.

Q. Hard to see this pen here.

But in 1978, Ms. Tedder asked you about, it looks like October, November. So it maybe looks like January, October, November, December and August. Were you working in the other months that aren't listed here?

A. Yes.

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Digitized by the Internet Archive http://www.industrydocuments.ucsf.edu/docs/hmxl0001

Q. All of the other months?
A. Yes.
Q. And what were your approximate hours per month back in 1978?
A. I'm guessing, because I know at that time I was -- no, I wasn't. I'm guessing anywhere between 60 to 80 hours a month.
Q. Were those international flights or domestic or a mixture of both?
A. That I think was domestic.
Q. June, July you were working. September and October.
Sixty to 80 hours a month for eight months?
A. Yes.
Q. I'm not going to ask you to do the math right now, but that adds up to several hundred hours of flying?
A. Yes, it does.
Q. In 1979 you were out for quite some time?
A. It looks that way.
Q. Was one of the times --
A. I --
Q. I'm sorry, go ahead. I didn't mean to interrupt you?

A. No, you're right.
Q. In 1979 were you out, was that a time that you had a leave of absence?
A. I believe that was one of my leaves, yes.
Q. And it went into 1980 to be home with your son and to teach at his preschool?
A. Yes.
Q. So it's fair to say in that particular year you had a significant period of time off 1979 into the beginning of 1980?
A. Yes.
Q. In 1981 there are four months crossed out here; were you working the rest of 1981?
A. Yes.
Q. So from January, February, March, April, was part of the leave that you had continued from November, December, that's a six-month leave. Then you worked the whole rest of the year 1981?
A. Yes.
Q. So eight months.
I need a better highlighter.
1982 isn't on here because?
A. Obviously I worked.
Q. And obviously you were exposed in 1982.
1983 shows only two months that you were

out of the 12-month period.
And so then is it fair to say that you were working the other months that aren't listed here?
A. Yes.
Q. So that's 10 months in 1983.
And then 1984, again, you were out for a total of approximately two months, working 10 months 60 to 80 hours a month?
A. Yes.
Q. On a mix of domestic and international flights?
A. That is correct.
Q. And commuting from New York -- I'm sorry, from Los Angeles to New York?
A. Right. Yes. Those months from '78 to '84, the middle of '84, summer of '84 is when my transfer went through to L.A.
Q. So that's 10 months.
Now in this little tiny space, there's something missing, right?
A. Yes.
Q. What's missing between 1984 and 1990?
A. Looks like I was a pretty good girl. I flew a lot.

Q. That means you were flying?
A. I was flying.
Q. Consecutively 1985, 1986, 1987, 1988 and 1989 occasionally missing time for illness, but otherwise you were flying a full schedule?
A. Yes.
Q. And in 1990 you were out for just two months, right?
A. Yes.
Q. And so you worked the other 10 months?
A. Yes, I did.
Q. During that year.
And in 1990 the ban on flights in the United States of six hours or more, I'm sorry, of six hours smoking was banned now, essentially meaning smoking was banned on all U.S. flights?
A. Yes.
Q. But the chart ends here in 1990. You continued to fly -- you still fly now, right?
A. Yes, I am.
Q. But you're not employed by TWA; American Airlines took over TWA?
A. It's all American.
Q. Have you flown since 1990 continuously to this day?

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

A. Yes, I have.
Q. And in 19 -- somewhere between 1990, after the ban and today, were you on any international flights that had smoking on board?
A. Yes, until they banned it totally, I would do it, a combination of international and domestic. As I said before, commuting to New York. So, yes.
Q. What was --
A. I was involved in smoking sections. Ms. Tedder brought up even first class, but there was smoking allowed in first class.
MR. REILLY: I object, Your Honor. I think it's nonresponsive to the question that was posed.
THE COURT: I don't know that you can raise that.
But let's proceed by a question and answer.
BY MS. WEINSTEIN:
Q. Mrs. French, was there smoking allowed in first class?
A. Yes.
Q. And was it allowed in the 1990s when you were still flying?

A. Yes.
Q. And in the four or five flights that the Defendants mentioned in first class smoking was permitted?
A. Yes.
MR. REILLY: Can we have a sidebar?
THE COURT: Was it something about the dates?
MS. WEINSTEIN: I'm referring to the international flights in that time period.
THE WITNESS: Yes.
BY MS. WEINSTEIN:
Q. Not domestic flights that left from either L.A. to New York?
MR. REILLY: Your Honor, the exhibit that she's referring to are domestic flights.
THE COURT: There wasn't anything that indicated domestic flights.
MR. REILLY: The destinations are right on them.
THE COURT: On the exhibit that she's referring to is the chart that hasn't been marked.
MR. REILLY: No, she's talking about -- well, I don't want to --

THE COURT: That's okay. Overrule the objection and go ahead. I think I understand what you're saying.
BY MS. WEINSTEIN:
Q. When you were out sick, sometimes you have to submit a doctor's note and sometimes you wouldn't, right?
A. Right.
Q. And on those occasions when you didn't have to submit a note, did you have to tell them why you were out?
A. Only if you exceeded nine days.
Q. And did TWA -- had you informed TWA at some point that you had a problem with sinusitis?
A. I had spoken to my supervisor a couple of times about my problems. You were able to confide, I should say, in them. And that's what they wanted you to do.
Q. Ms. Tedder talked about certain specific dates going back 20 to 25 years ago and asked you if you remembered why you missed work that day. Is it easy for you to remember 20 years ago?
A. No, it's not. It's not.
Q. Some of the times that you were out December 1, '76 to December 23, '76, we all know

that December 24th was Christmas?
THE COURT: We do? December 25th. You're close.
MS. WEINSTEIN: I ask the Court to take judicial notice that December 24th is Christmas Eve.
MR. REILLY: We'll stipulate to that.
THE COURT: Agreement?
BY MS. WEINSTEIN:
Q. So you took some time off in the Christmas season in 1976 25 years ago; is that right?
A. Yes.
Q. And in 1978 you again took off two or three weeks around the holidays?
A. Yes, I did.
Q. And later on in your career you were taking less time off; is that right?
A. Yes. I was. I had learned by then.
Q. And you had learned because you had been reprimanded for your absenteeism?
A. Yes, twice I think.
Q. In fact, they threatened, if you want to call it a threat, they threatened to terminate you?
A. That was true. They were starting the

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

steps to termination.
Q. And so you began to fly some times when you were sick?
A. Oh, yes, I did. I did.
Q. And you didn't want them to know all the time that you were sick because you would get another letter like that?
A. That's right.
Q. This is an exhibit that Defendants showed you before. They showed your absences. I don't know if you can read that or not. It says in 1980 there's a lot of days where you were out for personal illness, May 10th through June 3rd, July 3rd same thing, personal illness. Sick bank exhausted. August 2nd, August 9th. A lot of sick days.
And the Defendants pointed out that that doesn't mention sinusitis. Does that mean that you weren't out with sinusitis?
A. No, it doesn't mean that at all.
Q. This just reflects that you had just asked for time off because you were sick?
A. I'm sorry, Rhonda, I'm not following you. I'm sorry.
Q. It just shows that you were out a number

of days. And it says personal illness, but it doesn't specify what you were out with?
A. No, it doesn't. Nor did they request as to why I was ill.
Q. This is another record that Ms. Tedder highlighted for the jury to show that you were out July 7th of 1979 to have minor surgery for varicose veins. Do you recall also being out just about three months before that -- I just obliterated it -- but for bronchitis; do you recall that you were out?
MS. TEDDER: Objection, relevance, Your Honor.
THE COURT: Sustained. Well, it's just relevant the same way that any of the reasons are.
MS. WEINSTEIN: We were talking about absences, so...
BY MS. WEINSTEIN:
Q. This is a letter that you were shown from Dr. Traxler showing that you were out in 1987 with complaints of sinus and ear trouble. Had you ever seen Dr. Traxler before this?
A. No.
Q. Do you know when he wrote this report of

whether or not he had any of your records from all of your treatment in the 1980s?
MR. REILLY: Objection, Your Honor, calls for speculation.
THE COURT: Overruled. But I think Ms. Tedder would like to make an objection. She had the witness.
MR. REILLY: She did, Your Honor, but I've been making the objections. And does it matter?
THE COURT: It's supposed to be the same lawyer. You're sitting right next to her. Anyway, I forget now what the objection was and what I ruled.
BY MS. WEINSTEIN:
Q. This is another exhibit that you were shown dated June 7th of 1988 where you reported that you had a sinus infection and you were seeing Dr. Patty; is that correct?
A. Yes.
Q. And another exhibit that you were shown to highlight your absence in July of 1990. And that that's why you were out in April of '91 right above that notation it says you were out for a sinus infection, but the Defendants didn't

highlight that.
Do you remember being out for a sinus infection in the 1991 time period?
A. Yes.
Q. Going back to that same exhibit. In 1989 you were out because of sinus surgery. And that wasn't highlighted. And in September of '89 you were out because of a sinus infection. Do you remember having sinus infections in 1989?
A. Yes. I think that was just before my surgery, wasn't it?
Q. We've talked a lot about your absenteeism. Kind of paints a picture like you're not there all that much.
This is from an exhibit that's already in evidence, a letter from TWA. Can you read that?
A. Yes.
Q. I don't mean too embarrass you, but can you read it out loud?
A. "I want to extend my congratulations to you for having been nominated for the 1992 semi-annual first half award of excellence.
The attached is a copy of the nomination submitted on your behalf. It is an expression of the positive impact you have made upon those with

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

whom you work. You should take pride in having been considered. Thank you for your contribution toward excellence in customer service."

Q. So in 1992, even though your absenteeism history, TWA was pleased with your performance?

A. Yes.

Q. The flight logs that you were looking at before for 1994 and 1997, was that reflective of the number of hours that you typically worked in the 1980s?

A. Yes, that is true, the true data, the flight log, yes, that we received every month, so you could figure out your pay expenses and so forth.

Q. And now we know that the flight logs from 1976 up to that time weren't available due to the passage of time. But if we were to look at those flight logs, what kind of hours would we be seeing on a monthly basis?

A. I believe that you would be seeing the average of the 72 to 78 hours per month. I think that would be the average.

Q. And did you ever fly something called high time?

A. Yes, I did.

Q. Can you explain to the jury what high time is?

A. High time, when you received a line, what they called a line, which tells you which flights you have been awarded due to seniority, they add up the total of hours and that's what they call a cap. And normally it would go, run between 72 flight hours to 76 flight hours, depending.

And anything over that would just be considered your flying higher time. That you would get paid also -- nothing over, but you would just still get paid, but the same amount.

So sometimes you would try to squeeze in even one more flight, which was a two-day or three-day flight just to make more money, makes ends meet.

Q. We also talked earlier about the records that showed you the comment cards and customers that show that on those occasions you were serving first class or business. And I believe there were maybe three or four instances where you got a comment from a customer who was sitting in first class or business class. How often were you in first class or business class on an international flight?

A. Unfortunately, not that often. It went very senior. We had a briefing before each flight and you would bid positions according from seniority, the most senior gal or guy down to the most junior person. And what was ever left over, went to the junior person. And it was usually me.

Q. When you were in the first class section, the business class section, on the rare occasions that you were, was there smoking permitted?

A. Yes.

Q. In those areas?

A. Yes, there was.

Q. What was the air like in those areas?

A. Well, smoking is -- smoke is smoke. You know, it doesn't matter. There are absolutely no partitions. So smoking from the back would come forward and vice versa, so you're in a smoke environment.

Q. I'm going to hand you an exhibit that was -- a letter that's part of an exhibit that's already in evidence and ask you to take a look at that.

MS. WEINSTEIN: Sidebar has been requested.

(A bench conference occurred as follows:)

THE COURT: Well, I get the gist. I haven't read the whole thing. Has this been marked in some way?

MS. WEINSTEIN: It's in evidence, Your Honor, as part of the --

MR. REILLY: It's not in evidence.

THE COURT: Either it is or isn't, so let's figure that out.

MS. WEINSTEIN: It's part of the records we stipulated into evidence.

MR. REILLY: We object to it as hearsay, obviously.

THE COURT: I guess I need to know whether it somehow is already in evidence. Is it in a batch of things that have been introduced by the Defendants?

MS. WEINSTEIN: Yes, see the number down in the far right-hand corner?

MS. TEDDER: That tells you which page number.

MS. WEINSTEIN: 145 and 146 of Defendants' Exhibit, is it 1250, 1520? I don't remember the number.

THE COURT: Could you find the exhibit?

MR. REILLY: Your Honor, just so you

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the Industry Documents Library: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

understand, just like with the medical records and just like with what they said at the beginning of this trial, we stipulated that the medical records and the employment records could be put into evidence without further foundation, but subject to other objections like relevance or like hearsay, which is exactly what we're doing now.

THE COURT: Okay, but see, a lot of this was done, I guess, out of my presence beforehand.

MR. REILLY: No, Your Honor, we did that in your presence beforehand.

THE COURT: What about these large composite exhibits? Is it part of a large composite exhibit that's actually been introduced into evidence?

MR. WEINSTEIN: Yes.

MR. REILLY: Just like all of the medical records that these plaintiff's counsel insisted at the beginning of this trial that the medical records and the employment records were, quote, in evidence subject to the objections that would be made at the time any individual document would be presented.

THE COURT: Here's my problem. First I don't remember that. I'm not saying you didn't say it, I just would have to find something that refers to that. But if these have already been marked. There's huge stacks of things. So I don't know which exhibit this might be part of.

MS. WEINSTEIN: Here, judge.

THE COURT: What is the number?

MS. WEINSTEIN: 1950.

THE COURT: Okay, Exhibit 1950. So that whole stack is going to be handed to the jury during their deliberations. As far as I know they're in evidence. Now, if there was some agreement that not all of them would go to the jury or that you could raise objections, I'm not aware of that particular one.

MR. REILLY: Your Honor, if you would like me to find on the record from the very beginning of this trial. Counsel knows it occurred.

THE COURT: But what was your intention to do with these stacks of things? I'm not saying the jury is going to page through, I don't know how many pages there are even in

that exhibit. It looks like hundreds. But if that was going to go to the jury, how were we going to deal with this? If you're saying that you have certain objections to some of those pages.

MR. REILLY: Just as they answered the objections and presumably they will voice them owe on.

THE COURT: No, but I mean, were you going to go through those page by page and take things out or object to them at some point?

MR. REILLY: If they were used as, I mean presumably if we had, for example, included in the medical records will be the records from her hysterectomy and the records from her cosmetic surgery. And just as they objected to references to her cosmetic surgery, if we try to put those records in front of this jury, they will object just as they did.

THE COURT: I'm asking a different question. There's two ways it can be in front of a jury, if it's in a package of documents you've agreed to are stipulated are in evidence, that whole package could be handed

to the jury.

Yes, you might be banking that the jury is not going to go through each page. Now they want to publish a certain document that's already included in there. Did you have an agreement that you could still raise some of the agreements to the documents that were included in this?

MR. WEINSTEIN: We could have just sat, judge, not said a word, and read it in closing.

MS. WEINSTEIN: We're entitled to bring it up because they brought up customer comments.

THE COURT: That's a different issue. The question I have is whether there was some agreement about raising objection to documents -- what's the number of that?

MS. WEINSTEIN: 1950.

THE COURT: Just a minute. 1950 is a huge stack about seven inches high, I don't know. And in here there are a lot of records.

Now, this has been marked in evidence by the clerk as Exhibit 1950. These things were marked when I wasn't around. You came earlier

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the Industry Documents Library: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

and you gave them your list and made some agreement about how the numbers would be done.

Now, if there was some agreement on the record that not everything included in the Exhibit 1950 was admissible, I want to see where that is. The Plaintiffs said there wasn't, you say there was. So I need to see it.

MR. REILLY: But you'll have to give us a minute to find it.

MR. ENGRAM: Your Honor, what we did was dispense with the need for bringing the records custodians here to trial.

THE COURT: That's a different issue, because these all could have been marked for ID or had some other agreement that you didn't have a records custodian. But if you agreed that they could be marked into evidence not subject to some objections, that's fine. Let's talk about this one now because maybe it applies to something else, too.

Are there other, other than this page 145, are there any other records in here that the Defendant is objecting to?

MR. REILLY: No, Your Honor.

THE COURT: No?

MR. REILLY: I don't know why that's so funny.

MR. WEINSTEIN: That was stipulated --

THE COURT: Wait a second. How do you know -- did you know about this particular page 145?

MR. REILLY: Sure.

THE COURT: Are you sure you did?

MS. WEINSTEIN: This was also marked at a deposition as an exhibit of one of their experts.

THE COURT: So there are no other pages that you're objecting to?

MR. REILLY: No, Your Honor.

MR. WEINSTEIN: They knew about it.

MR. REILLY: Rhonda Weinstein is the person who insisted on the record in front of Your Honor at the beginning of this trial -- and she knows she did that -- these records subject to and she was speaking specifically to the medical records that if there would be specific objections to certain records, they would reserve the right to do that.

THE COURT: But you're agreeing to your

preserving the right. Where was the other part of the agreement?

MR. REILLY: It wasn't unilateral that only they could --

MS. WEINSTEIN: There are many medical records. And we stipulated some could come in and we stipulated that some others couldn't, such as cosmetic.

THE COURT: Wait a minute. You're offering the exhibit. The Plaintiff says, okay, this is what you're saying, I don't remember it, but the Plaintiffs are saying, well, okay, we'll agree that they can come in subject to our objections, but I don't know if you had the same agreement or not, frankly, I don't know.

MR. REILLY: Judge, I think the only way you'll satisfy yourself is if you look at that portion of the transcript. And I'm more than happy to give it to you. But it's going to take me a little bit to find it.

THE COURT: Let's assume there was no agreement that this, all the documents could come in, let's assume that for a minute. Let me hear what this objection is and then we'll

see. If that agreement is found and I'll hear this objection, if it's not found, I guess it's in evidence. So your objection is it's hearsay.

MR. REILLY: Sure.

THE COURT: Now, it does seem like it's hearsay. What's the Plaintiff's position? This is a letter, by the way.

Excuse me, Mal, could you mark this separately as ID?

MR. WEINSTEIN: It's part of the medical records --

THE COURT: Not medical.

MR. WEINSTEIN: Part of the business records kept in the ordinary business, we stipulated to that. There never was a reservation. As I said before, judge, we could have read it to the jury. It's in evidence and we're only bringing this out because they brought out that she wasn't subjected to smoke like as in the first class area. And then they brought other records to show how much smoke she was subjected to. She was in first class, she was there and there.

This is part of the records kept in the

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

usual business. It was brought out to them before in a deposition marked as an exhibit and still they didn't object to it when it went in evidence.

THE COURT: Mal, what would it be, please?

THE CLERK: Defendant's A 273 for ID.

THE COURT: 273 for ID.

(Defendants' Exhibit 273 was marked for identification.)

THE COURT: So the objection is that it's hearsay and the Plaintiff's response is, aside from their saying that you agreed that it could come into evidence, their response is it's an exception to the hearsay rule because it's part of the business records of TWA. So is it or isn't it? It appears to be, is there anything further that you want to say?

MR. REILLY: It's part of the business records or not is part of the foundation issue that we've dealt with already.

THE COURT: Wait a minute. If it's a business report, that's an exception to the hearsay rule.

MR. REILLY: Only if you have the proper

foundation, et cetera.

THE COURT: What foundation?

MR. REILLY: The foundation that we stipulated to subject to our objection.

THE COURT: Now we're talking in circles.

Let's assume for a minute you can raise this objection, although I don't know that you haven't waived it. Let's assume you haven't waived it. You're objecting because of hearsay and they're saying it's part of the business records. That's an exception to the hearsay rule.

What foundation? I mean, there's no foundation about it unless you're saying these aren't business records, but I think you've already agreed that they're business records.

MR. REILLY: I don't dispute that this is a record containing the business file of Transworld Airlines. However, I don't think you get to put in all the business records of an entity for whatever purpose. And that is clearly for the purpose of establishing this hearsay.

THE COURT: It's not to establish any purpose other than to establish accuracy of

what this person is saying.

But the business records exception deals with that. Either you've stipulated that these are all business records or not.

MR. REILLY: Every medical record would come in regardless of --

THE COURT: If there's a stipulation about them coming in, yes.

MR. REILLY: Your Honor, there's a stipulation, but in this case there is no stipulation. It's a stipulation subject to a specific objection, which I'm happy to show you.

THE COURT: But what would the objection be?

MR. REILLY: Hearsay.

THE COURT: We're going in circles. Either you've stipulated that these are all business records under the hearsay rule or you haven't.

MR. REILLY: What we stipulated was that these records could be put in evidence without further foundation or authentication.

THE COURT: Well, foundation and -- okay. If you're saying all you did was agree to the

authenticity of the records and nothing further.

MR. REILLY: Correct.

THE COURT: Then none of these should be in evidence.

MR. REILLY: Subject to objection. I mean, you have to make an objection.

THE COURT: I want to see what their stipulation was because if it's just as to authenticity, you can raise an objection. But your objection then is that the foundation hasn't been laid that this is a business record. I'm trying to understand what your objection is. I mean, could someone, one of you look for the stipulation while we're doing this?

MR. REILLY: Your Honor, I would suggest we let the jury take a short recess while we find this. Because it's going to take me --

THE COURT: Okay. Maybe we could finish with your other questions.

MS. WEINSTEIN: This is it, judge.

(The bench conference ended.)

THE COURT: We're going to have to take a short break. Sorry, we're a little bogged

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/hmxl0001

down here. So could you go to the jury room?
(Jury exits courtroom.)
(A recess was taken.)
MR. REILLY: Judge, they are thinking that it must be off the record.
THE COURT: Don't laugh. You don't like it when they laugh.
MR. WEINSTEIN: You're absolutely correct, I apologize to Mr. Reilly.
MR. REILLY: I don't care if you laugh. But they're going to look. But other people are telling me I'm making a mountain out of a mole hill. Perhaps I'll let this mole hill go.
THE COURT: So you're in effect going to withdraw your objection.
MR. REILLY: Let me make sure. Give them another minute or two, if you don't mind. I don't want to delay this too long.
MR. McCUE: Your Honor, I would also just like to iterate that I believe that the question here would be beyond the scope of the cross examination. During the cross examination, Ms. Tedder went into specifically about what types of flights she took, what

types of leaves she took. Where she flew on the aircraft. She didn't talk about issues regarding the conditions. She didn't talk about that it didn't bother her. She didn't question her regarding her effects. Didn't question her about what this Dr. Yoasem will be testifying to.
THE COURT: She certainly didn't testify about this particular letter.
MR. McCUE: Or even the questions for which this letter would be offered for. But I submit it's beyond the scope.
THE COURT: Whether it's beyond the scope or not, if it's in evidence they can refer to it in any way they want to.
MR. McCUE: I understand, but for these purposes. What is the question of the witness about this letter anyway?
MS. WEINSTEIN: I'm going to ask her just like they asked her to look at customer comments. They asked her to look whether she was in first class or coach. And --
THE COURT: Does this have anything to do with first class?
MS. WEINSTEIN: This shows she was in

coach.
THE COURT: How does it show that? Even Ms. French, why is it exactly in her file?
MS. WEINSTEIN: Because she was on this flight. And this is --
MR. McCUE: Your Honor, in answer to your question, the only reference to anything regarding where this person was smoking -- there was a smoking section on the flight without any reference to coach or first or otherwise.
THE COURT: Yes, I don't see any reference to first class or coach or anything.
MR. WEINSTEIN: Judge, this is only going to take a few moments.
THE COURT: That's irrelevant.
MR. WEINSTEIN: I know that, but the point is, judge --
THE COURT: This doesn't have, I mean, it might be in their file. I'm not sure why. If it's in evidence, you can refer to it later. But what possibly could you ask Ms. French about this?
MS. WEINSTEIN: Well, I want to ask her if this was in her file. Does this mean that

this person was on one of her flights? That this person actually rode on the same plane that she rode on because that's an issue in the case because they've asked other witnesses, well, you've never flown on her flights, you've never experienced those conditions, you weren't there on those TWA flights when smoking was permitted. But this person was and it's a business record.
MR. REILLY: Your Honor, that would be beyond the scope of cross examination. We didn't ask her --
THE COURT: I'll tell you what. She can explain why this is in her file, if she knows. And that it means that this person was on the flight. And I think it's relevant to show what the smoking nature of the flight was.
MS. WEINSTEIN: I'd also like to ask her if she had other similar complaints from passengers.
MR. McCUE: Well, that would be hearsay.
THE COURT: I would sustain on hearsay.
MR. REILLY: My question is, that is well beyond the scope of cross examination. We didn't ask her anything about passenger

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the Industry Documents Library: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

complaints. We didn't ask her anything about whether any of these people were on flights.

THE COURT: I'll tell you why I didn't think it was beyond the scope, because there certainly was implication in your questioning was -- the whole thrust was how much was Ms. French exposed to secondhand smoke during her flying. So I think this broadly is related to that. If it's clear that this person was on her flight and was complaining about the smoke, you know, at least that's some evidence that there was smoke on this flight.

MR. McCUE: But there's no question that Ms. French has been exposed to smoke during her career.

THE COURT: But it's a question of how much and how bad it is. And here is a person who thinks it was pretty bad. So overrule the objection that it's beyond the scope.

You're withdrawing your other objection that it's not in evidence. Because apparently it is part of the documents that were stipulated into evidence.

These were marked when I -- before, maybe

before we started the trial. But I asked the clerk how it was that this came to be marked. And she indicated that all of these documents were given to her, this group, by the Defendants and that it was stipulated that these were in evidence.

Now, I don't know if there was any other discussion, but that's what she indicated. So I think it's in evidence and it's not beyond the scope.

MR. REILLY: You know, Your Honor, I have another objection to this and that is at the bottom of page 1, this is a physician who is commenting on the dangers of cigarette smoke, talking about carcinogens. I think the probative value of this is outweighed by the prejudicial effect of it. We have scrupulously prevented extraneous disease information from entering into this trial and to now for a purpose that is as thin as the one described, the question of how much exposure did she have to cigarette smoke on board aircraft.

THE COURT: But that is a big issue in the case from your point of view.

MR. REILLY: It may be, but how much is this letter going to impact that issue versus the multiple witnesses, Your Honor --

THE COURT: Maybe it can be redacted, that one little line. Actually I can't read it very well. It's kind of blurred at the end. But at the bottom of page 1 there's a paragraph that says, as a physician I'm well aware of both the something -- I can't read it -- the dangers of cigarette smoke as a carcinogen -- and then I can't read it after that. Something about nonsmokers. But I think that line could be --

MR. McCUE: Would it be also possible, based on the prejudicial effects, the fact that this person is a pathologist from Stanford University be also redacted. Because if it is just simply to state that this is coming from another passenger who had exposure on one of Ms. French's flights and that he had certain reactions to it, well, so be it. But to have it come with the statement that he's a pathologist from Stanford University, that certainly does outweigh.

MS. WEINSTEIN: That's who he is, judge.

THE COURT: Let's see. Don't put it on the screen there. If you want to -- or you can, if you redact that last paragraph on page 1. Then it goes over to page 2, and the top part is something about addiction. I think that should be taken out, too. Maybe start with, that this is not an idle complaint.

MR. REILLY: Actually, it says in addition, not addiction. I am aware of individual regulations or some kind of Regulation on -- you know what, I don't have a problem with that. If you would simply order that the bottom half, this last paragraph on page 1 be redacted, I'll withdraw my objection and announce it to the jury.

THE COURT: So do you want to -- if you want to show this to the jury what we need to do is redact the copy of this. Just cover it. You can put a piece of paper over it. Put it on the screen now. Put it up there now and put a piece of paper over the bottom part there.

MR. REILLY: I think it might look like we're trying to conceal something.

MS. WEINSTEIN: You are.

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the Industry Documents Library: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

THE COURT: Well, it's got to be redacted in some way.
MR. WEINSTEIN: Judge, the case is not about cancer. We're assuming that these jurors are imbeciles. That they live in a vacuum, in a bubble, that they don't know what a carcinogen -- they know that this case is not -- the jury knows this case -- I mean, how dumb can we think the jury is. They know that this case is not about cancer.
THE COURT: Well, I'm going to do it anyway. Everybody knows whatever they know about cigarettes and cancer and that this case isn't about cancer. But we'll redact that one line. I'll need that whiteout, too.
MS. WEINSTEIN: Are you redacting the entire portion where it says, as a physician I am well aware of both the dangers of cigarette smoke? Are you redacting that as well?
THE COURT: Then what does it say after that?
MS. WEINSTEIN: As a carcinogen, it seems to make sense if you're going to redact at the word carcinogen, to redact it at the word carcinogen.

MR. McCUE: His reference is to the dangers of direct smoke.
MS. WEINSTEIN: Nonsmokers on the bottom. Clearly.
MR. WEINSTEIN: As I understand it, you want the word carcinogen out?
THE COURT: Now I don't have it in front of me anymore. I gave my copy away.
MR. WEINSTEIN: But it has to be in there that he's a physician.
THE COURT: Well, it's already clear that he's a physician.
MR. McCUE: Your Honor, just one last issue on the matter of his being a physician. One of the exceptions to the business records -- one of the exceptions to the exception of business records is that if there are underlying opinions for which you cannot test that author's basis and predicate for the -- for its opinion that does not fit within the business record exception. That is still one of those that you can --
THE COURT: I'm ruling that you've waived any objection by offering this into evidence without any stipulation.

MR. McCUE: Well, stipulation to the business records has been done and can come in.
THE COURT: Stipulation that it's in evidence. Stipulation that it's admitted into evidence. It appears that that was your agreement.
MR. McCUE: Under the understanding that these were business records. The one exception to that business records is the predicate.
THE COURT: No, you either agreed that it would be in evidence or you didn't. And it seems like you agreed.
THE COURT: Look at this one. All I whited out is, "As a carcinogen." But you know, you can't read the line after that anyway.
Put this on the screen, but showing the bottom part.
What you can see is, "as a physician I am well aware of both the dangers of cigarette smoke" and then I whited out the next couple of words and then you can't read the bottom part.

You can go over to the next page.
MR. REILLY: Your Honor, I would simply request that you eliminate that whole two lines, because they don't have any probative value in this case and they're highly prejudicial. Here's a physician who we can't cross examine, it's the equivalent of allowing some sort of article by a physician who we haven't had an opportunity to cross examine. He isn't saying I'm Joe citizen. I'm a physician. And I'm well aware of the danger of cigarette smoke.
MR. McCUE: Yet, he's testifying as a citizen that these were the effects and that was the probative value the court found.
THE COURT: Okay. I'm going to whiteout some more, over the Plaintiff's objection.
THE COURT: You can see that he's a doctor and he's not expressing his medical opinions. He's complaining about smoke in the cabin and how it affected him and that there wasn't a nonsmoking seat available.
So we'll bring the jury back in.
THE COURT: The redacted one is going to have to be substituted for the other one in

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/hmxl0001

the actual batch of records.
We can find it and do that later. But right now it's the redacted one that's going to be shown to the jury. The other one should be kept for ID. One that's not redacted. Although I've said it on the record how I've redacted it, we'll keep the one that's not redacted anyway for ID. In fact, it's now A 273 for ID. That's the unredacted one. Keep that one marked that way. And then that one won't go to the jury and then the other one that's redacted is going to be put in the big package there.
(Defendant's Exhibit A273 was marked for identification.)
MR. WEINSTEIN: Judge, most respectfully, can we take out two words that says at TWA. He says on the second page, writing this on the Eve of my return at something or other on an invitation and frustration at TWA.
THE COURT: What's the problem with that? He's writing to TWA.
MR. WEINSTEIN: But it shows like he's blaming TWA. Can we take out --
THE COURT: No, he's writing to TWA.

It's clear he's mad at TWA.
MR. REILLY: He's accusing them of violating a rule.
MR. WEINSTEIN: I don't mind if you take out at TWA.
MR. McCUE: But that's the purpose of the letter.
THE COURT: What's the problem with that? It's clear he's angry at TWA. TWA is the one that didn't provide him the seat. That's the whole point of this letter.
So does this letter go into everybody's file who was on that flight, is that it?
MS. WEINSTEIN: Yes.
Okay. Are we ready for the jury?
(Jury enters courtroom.)
THE COURT: Let's have a seat and I think we'll proceed with the redirect examination.
MR. REILLY: Your Honor, I withdraw my objection.
BY MS. WEINSTEIN:
Q. Mrs. French, I just have a couple of more questions and we'll be wrapping up. We talked earlier about complaints from a passenger. And do you know if any complaints were made by passengers

on your flights?
A. Yes. Received several.
Q. And you're aware that there is a complaint from a passenger in your file?
A. Yes.
Q. With the Court's permission I'd like to put it on the screen.
It's very hard to read this letter so I'm going to do my best to try to read it. It's written in script.
Let me just back up. When a letter like this goes into your file, is it because somebody was on your particular flight?
A. Yes. They would pull up the list of the crew.
Q. And this letter that we have that's marked as an exhibit was from a person on a flight from Madrid to JFK New York. I'm just going to read from the letter.
TWA Airlines, New York, New York.
"Dear sir, as a frequent passenger on TWA, I am promptly writing to your office after a particularly irritating incident, both inconsiderate on TWA's part and a violation of federal regulation on the other.

"At seat selection on my flight from Madrid to New York, I requested a nonsmoking seat. The response was that all were filled and I was given a smoking section seat despite waiting for a nonsmoking reservation to cancel. And a protest citing federal regulation on my boarding pass. As luck would have it, I was seated adjacent to two 'chain' smokers who went through one and a half packs during the flight. I spent much of my time standing in the aisle or catching mouthfuls of smoke in my seat. As time went on, I developed eye irritation, chest discomfort, a throbbing headache and general malaise."
And the second page is a little hard to read the top line. I'll read from where I can make it out.
"...that this is not an idle complaint is also reflected in numerous state laws under consideration to protect nonsmokers. It is, in brief, a gross violation of personal rights protected by state and federal law.
"Writing this on the eve of my return" -- can't make out the next word -- "an irritation and frustration at TWA, I would like some

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

response from your office in the form of policy statements, following investigation or even financial restitution.

"Awaiting your response, sincerely, Samuel A. Yoasem, MD, 2024 Euclid Street, Palo Alto, California, 94303, Department of Pathology, Stanford University Medical Center, Stanford, California."

Were you aware of this particular complaint?

A. Not while I was working the flight, but two weeks later, or three weeks later I was made aware of it by my supervisor.

Q. And this was put in your file because this was a passenger on a flight that you were working?

A. Yes, it was placed in my file along with the rest of the flight attendants that were working that flight.

MS. WEINSTEIN: Thank you. I have nothing further, Your Honor.

THE COURT: Okay. Thank you. You can have a seat back at the table.

THE COURT: Assuming we're going to follow what we discussed before, I'm going to

discharge the jury, or not discharge you, but excuse you.

MR. TROP: Your Honor, would this be an appropriate time to read the mortality tables?

THE COURT: If you wanted to do that now it's very brief, go ahead.

Do you want to explain what they are?

MR. TROP: These are the mortality tables found in volume 27 of the Florida Statutes that basically the government sets out the averages of how long certain people are expected to live based upon their age at this current time.

So according to the mortality tables found in volume 27 of the Florida Statutes, Lynn French, at 56 years of age is expected to live an additional 27.71 years.

THE COURT: These are just statistical tables that are based on statistics in this country, if you're a certain age, how much more life expectancy you have based on statistics.

Okay. So I think then we'll recess, that is, the jury will be able to leave and we'll take up the other matters, so as not to take

up the jury's time.

Tomorrow is Wednesday. We'll start at 9:15 tomorrow. We should have a full day tomorrow and a full day on Thursday. And hopefully get the case to you for your consideration some time on Friday. I hope that we'll be able to accomplish having all of the witnesses, both for the Plaintiff and the Defendant in time to send you the case at a reasonable hour on Friday for your consideration.

But now you're free to do whatever you'd like of course. We'll collect your notepads. Don't discuss the case with anybody and we'll see you back tomorrow at 9:15 on the fourth floor.

(Jury exits courtroom.)

THE COURT: Okay, so should we go right to Dr. Richmond?

THE COURT: There's a little bit of 5907 marked in orange.

MS. TEDDER: We had revised the counters. Amended and shortened the counters.

THE COURT: Let's go ahead. Point me to the page and line. 5908.

So does the Plaintiff know which, your new crossdesignations are?

MS. TEDDER: Yes, Your Honor, we gave those to the Plaintiff on Monday.

MS. WEINSTEIN: I think we do.

THE COURT: Then what I need to know is the first objection the Plaintiff has. Let's go quickly if we can because we've got to go through Dr. Stammberger's testimony.

Come on, it's quarter to 3:00.

I don't want to hear what you don't object to. I'd like to hear what you do object to.

MS. WEINSTEIN: There's only one. Page 5917, line 13 through page 5922, line 12.

THE COURT: Let me read that. What is this about? Tell me generally.

MS. WEINSTEIN: It's about the 1979 Surgeon General's Report. And the basis of our objection is my understanding is that the Surgeon General's Reports, in particular the '79 report, was not allowed to be included in the testimony that was already designated. And that was something that was excluded.

THE COURT: So in other words, on the

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

part of the testimony that the Plaintiff has presented here, there were no questions about the '79 report.

MR. ENGRAM: Your Honor, I think there were, but they were taken out over our objection, based on our objection.

MR. WEINSTEIN: May we just read this over for a moment, judge? It may be that we'll withdraw it.

MS. TEDDER: If the ruling is -- I'm sorry, Your Honor, if the ruling is the Surgeon General's Reports are not going to be used in this case --

THE COURT: I don't know that I made a general ruling like that. I think that I ruled on the objections to the direct. And maybe --

MS. TEDDER: Yes, I think you did rule.

THE COURT: Maybe I sustained your objections to the '79 report.

MS. TEDDER: I actually thought Your Honor's ruling was a mixed bag.

THE COURT: It may have been. I'd have to review it.

MS. TEDDER: And I thought Your Honor

allowed questions about, for example, the 1986 Surgeon General's Report.

THE COURT: I may have, but now we're talking about the '79 report. I'm pretty sure I did allow something about the '86 report.

MR. ENGRAM: Your Honor --

MR. WEINSTEIN: Judge, we're asking that this part there about the 1979 report, any questions pertaining to the '79 report, our objection is that the 1986 Surgeon General's Report dealt with environmental smoke. And they're asking him about a prior report in which he says here that that's not -- he says, that was one of your conclusions, he's taking about the '79 report. And then, and I'm talking about page 5919, and then he goes on and says, here's a quote: So in essence what that means is it was a conclusion in your 1979 report that healthy smokers do not experience health effects from breathing other people's smoke?

He says: No, that's not precisely what I said because if you read in another area there's sufficient suggestion concerning health effects, so that much further study is

warranted.

And in '86 --

THE COURT: Wait a minute, Mr. Weinstein. I don't know what your point is here. First, I want to know, are the Defendants designating this part that the Plaintiffs now are objecting to? And if not, that takes care of everything. If so, then I need to understand the nature of the Plaintiff's objection, which I'm not understanding thus far. So let me see.

MS. TEDDER: Your Honor, I think in light of your prior rulings, having us taking a look back at those, I think you did exclude most of the substance of the '79 report. Therefore, we will withdraw this designation.

THE COURT: So on 5917 from line 13 all the way through 5918, 5919, 5920, 5921 through 5922 up through line 11.

You could have done this before and we could have played this now.

MS. TEDDER: They have additional designations, Your Honor. They have amended and added recently additional testimony, which they had not designated before. So they've

gone back, added some additional things. And we have objections to that.

MS. WEINSTEIN: They're short, I promise you.

MR. WEINSTEIN: 5917 from 13, just to be sure.

MS. TEDDER: Through 5922.

MR. WEINSTEIN: Up to 11, correct?

MS. TEDDER: Yes, that's all out.

Their first counter, Your Honor, is page 5910, new counter. Line 5 through 5910, line 10.

THE COURT: So these are things that you had previously designated.

THE WITNESS: You took away your designations and now the Plaintiff is designating.

MS. TEDDER: We shortened, they added.

THE COURT: But isn't the orange your original designations.

MS. TEDDER: I think the colors may be wrong on there.

THE COURT: Anyway, 5910 through what?

MS. TEDDER: Line 5 through line 10.

THE COURT: Line 5 starts with an answer.

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support for this project was provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/hmxl0001

MS. TEDDER: Yes, Your Honor, it's incomplete. I don't see any relevance.
THE COURT: You have to have a question here.
MS. WEINSTEIN: 5910, line 3.
THE COURT: Starting at line 3, this is like a new designation now of the Plaintiffs. Now the Plaintiffs, right, I think he had originally designated it. Now you're designating it.
Page 5910, line 3: Sir, you have no formal training in epidemiology?
And then he answers: What's the objection by the Defendant?
MS. TEDDER: First of all, we objected because it was the answer only, but I also don't see the relevance.
THE COURT: I'll let that in. Overruled. What's the next?
MS. TEDDER: The next one I believe is -- we've objected to 5973.
THE COURT: What part is the Plaintiff reading on 5910, just those -- that question and answer?
MS. TEDDER: That's all, Your Honor.

THE COURT: Okay.
MS. TEDDER: Then on 5973 they have designated lines 7 and 8, which is again an unintelligible designation.
THE COURT: 5973, line 7?
MS. TEDDER: Yes, lines 7 and 8, which is an incomplete --
THE COURT: You can't start with an answer.
MS. WEINSTEIN: Judge, I think this is a mistake. 5973.
THE COURT: You're probably looking at 5975, line 7.
MS. WEINSTEIN: That I wouldn't put in there.
THE COURT: Would you not have?
MS. WEINSTEIN: No.
THE COURT: That's the part that's marked in orange here; do you want anything on 5973?
MS. WEINSTEIN: No, I must have been referring to a different page and there was a typo. And now I have to figure out what it was.
MS. TEDDER: So there's nothing on 5973? You're withdrawing that?

THE COURT: I'm going to give you two more minutes. We need to spend the time on Stammberger.
MS. WEINSTEIN: Don't worry about it. We'll withdraw it.
MS. TEDDER: 5973 line 7 through 5973 line 10 is withdrawn? These are your counters, Rhonda? We filed on June 10th your -- you were faxed over copies of our objections to your latest counterdesignations, which you filed on June 7th, Friday. We faxed you over objections on Monday. 5973, line 7 and 8, 5973, line 11 through 5975, line 10 is what you have. And we would object to all of that.
MS. WEINSTEIN: That doesn't make sense. It almost looks like I was looking at a different transcript.
THE COURT: So that's gone.
MS. TEDDER: The remaining is 5975, line 12 through 5976, line 23. And this, Your Honor, we have objected to as not relevant, talks about diseases other than chronic sinusitis. And certainly what little it says that isn't colloquy between counsel, is

cumulative to what we already have in this case as to whether or not passengers who were not sitting in smoking sections were exposed to smoke.
MS. WEINSTEIN: I figured out 5973, line 11 meant to be 5976, line 11 through 5976 through line 23.
THE COURT: All I'm looking at now, the Plaintiff is not designating anything on 5975. And on 59 -- so don't worry about that one. 5976, line 11 where actually it's line 12. Question: Now one of the studies that Mr. Coffer mentioned; is that where we are?
MS. WEINSTEIN: Yes.
THE COURT: Was a study dealing with nonsmoking passengers on airplanes. Let me just read that.
MS. TEDDER: The objection is it's relevant, but it's certainly cumulative.
THE COURT: I'm going to let it in. But you know, if people don't get this by now. That's okay.
MS. TEDDER: I believe that concludes, Your Honor, the counters by the defense and Plaintiff.

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/hmxl0001

THE COURT: So now Plaintiffs have to make immediate arrangements to have it edited, have the tape edited.

And now we're going to go to Dr. Stammberger.

THE COURT: Dr. Ogden, does the Plaintiff intend to try to get this deposition of Dr. Ogden in that was taken on February 26th, 2001 in the Fontana case?

MR. WEINSTEIN: May I respectfully suggest to the court that this is really just like a deposition of a party; it can be used for any purpose.

And I would like to just say one other thing, judge, we videotaped it when counsel says we didn't know they were going to use it --

THE COURT: I guess your answer is yes, you are offering this. That's the first question I asked.

MR. WEINSTEIN: I'm sorry.

THE COURT: So you're offering it.

Now, before I hear anything further, I want to know if the Defendant is objecting and what the basis is. And then I'll hear the

Plaintiff in response.

MR. ENGRAM: Your Honor, we objected, as we told the Court on Thursday, we objected on the grounds that it was late notice in this case that they intended to use the deposition. The notice wasn't given until Wednesday of last week that they intended to use the deposition from the Fontana case. We also objected that we raised the objection at the time the deposition was taken with Mr. Hunter both as to the manner in which the deposition was taken, the late notice of videotape deposition, as well as the fact that he intended to use it at trial.

We would state for the Court that the deposition is not admissible under rule 803.22 on the grounds the Florida Supreme Court has refused to --

THE COURT: They seem to be now saying that -- I do remember there were several objections and one was whether it could be used at all. And then if we got past that the individual objections that I haven't heard yet because I haven't read it yet. But now the Plaintiff is taking the position that this

gentleman was a party.

MR. ENGRAM: I didn't want to waive any of the objections I made on Thursday in court. Your Honor, we would take the position that the -- and we did look at this issue. We did take the position that these statements by Dr. Ogden in a representative capacity don't constitute admissions given the nature of the questions that have been asked; and therefore, would not come in under that rule.

But we have gone ahead and filed with the Court today our objections to the specific designations of the deposition of Dr. Ogden. I don't know what the Court's intent is. Dr. Ogden's volume 1 video is going to be played in the Defendant's case-in-chief. The Plaintiffs would have a cross examination depending on what portions this Court might deem relevant, any of those portions could be played as a follow on to the Plaintiff's cross examination of Dr. Ogden from Broin 1.

THE COURT: Of course I haven't reviewed that.

Okay, actually, Mr. Weinstein was citing a different rule. The Plaintiff is claiming

it's former testimony. I don't know that it fits within that or if it does that that's applicable now given the Supreme Court's view.

The second thing was, today Mr. Weinstein is saying this is a -- I don't think he was claiming it was an admission, although it might be an admission, but that it was like the deposition of a party that could be used by the other party for any reason at trial.

MR. ENGRAM: That would have to be -- the Florida rules are very specific about that, Your Honor, that would have to be used in this case and requires a complete identity of parties. And because it was taken in Fontana, and was not noticed in French.

THE COURT: Although Mr. Weinstein didn't say it today, I think last week the Plaintiffs were taking the position that this was an admission as an exception to the hearsay rule, an admission of a party opponent. And I'll tell you, probably fits within that rule, because as I said, I don't think that admission means that what is being said is like a declaration against interest. It's not that exception. It's just a statement by a

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/hmxl0001

party made in its representative capacity about something that he's authorized to testify about. So I think it would probably fit in that.

But let me tell you, I read this deposition and I don't think there's much of it that's really relevant here or -- you know, we could go page by page, but first of all, basically he said he didn't know much of anything.

And then there are all these things about Philip Morris and what was Philip Morris is doing. You know, I mean, why is that relevant? I mean, he doesn't say anything about the actual measurements that he made. He makes reference to it. But what is the Plaintiff offering this for? And why is this relevant about what Philip Morris was doing?

MS. WEINSTEIN: Judge, Dr. Ogden is being offered. I know he's an RJR employee, but he's being offered on behalf of all of the Defendants. He's the principal scientist at RJ Reynolds and the person with the most knowledge about environmental tobacco smoke and the tobacco industry. Tobacco companies

worked together, they had industry organizations where they planned their strategies on how to handle research and media and marketing. And they did it together.

MR. ENGRAM: Your Honor, there's no evidence of that at all in Dr. Ogden's deposition. In fact, the evidence is to the contrary, number --

THE COURT: Is the Plaintiff offering this to show -- what is that you're offering it to show? Doesn't he say he doesn't know, he doesn't know what PM means and he doesn't know what Philip Morris was doing? What is that you're offering?

MS. WEINSTEIN: That might be his answer. I mean, I think the jury might find it hard to believe that PM stands for Philip Morris, that he doesn't know that. His credibility certainly stands in front of the jury.

MR. ENGRAM: Your Honor, this is an attempt to inject company conduct into this case. And we settled that in the settlement of the Broin class action.

THE COURT: It's true that that's not supposed to come into this case. Now, you can

attack his credibility. So see, I don't know what he says in the testimony that the Defendants are offering, because I haven't reviewed that part yet. But apparently, as I understand it, the Defendants are offering a videotape of this witness where he talks about measurements that he's made of ETS in the cabins.

MR. ENGRAM: Yes.

THE COURT: And he says I'm a scientist and I made these measurements.

MR. WEINSTEIN: Let me approach counsel for a moment on the side.

(A discussion was held off the record.)

THE COURT: Maybe there's a little part of this that could come in, but for example, I'm looking at the page 36 and 37 where Mr. Hunter is asking about his vindictive letter to Delta Airlines. I mean, you know, certainly doesn't make the Defendants look too good. But why is that admissible here? That they wrote this vindictive letter to Delta saying, watch out, we're going to make you bankrupt like Eastern.

MR. ENGRAM: One employee, Your Honor,

sent an e-mail.

THE COURT: But I don't see how it's relevant to any issue here.

MS. WEINSTEIN: They're doing research and they're making measurements on airplanes and they're selling those measurements to the public and saying that these are unbiased on behalf of RJR and these are unbiased measurements and these are accurate measurements of what levels of environmental tobacco smoke is on the airplanes.

And our position is that's really skewed. It's not just motivated by research.

THE COURT: You can make that argument. He's an employee of the tobacco company. You can make that argument certainly. And everyone will understand that. But why should you be able to get in this business about the letter to Delta? What does that have to do with whether the science is right?

MS. WEINSTEIN: Well, there are a lot of -- there's a lot of background on this, but our position has always been that the science as it exists on secondhand smoke is -- has been greatly impacted by efforts on the

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

tobacco company's parts to do research only that will benefit their position so they can continue to sell the cigarettes.

If all of the society wanted a ban, they wouldn't be out of business because they've still got other companies, but they wouldn't be selling as many cigarettes.

THE COURT: You certainly can make that argument. I assume you can make that argument no matter what the evidence is. That it's in their interest to keep selling their product, that's why they're in business. But still I don't really think there's much in here of anything that is really relevant to any issue in our case. You know, about having lawyers -- let's see.

MR. ENGRAM: Your Honor, you're exactly right. The issue in this case is: Did ETS cause her chronic sinusitis? And there's nothing in here about that.

THE COURT: Now, the thing is, they certainly can criticize the, quote, science from your people. You can criticize their science. And they can attack the source of the science. They can say, he's bias because

he's an employee of RJR and he is going to try to make it look like it's not so bad. But I just don't know -- could the Plaintiff point me to something in here that you think shows that, shows his bias?

MR. WEINSTEIN: Judge, if they have a written policy that they're going to drive an airline out of business and force them into bankruptcy if they enforce a policy of prohibiting smoking on the airline, that does affect the credibility of their scientists and of anybody who works for them. And if the jury doesn't know that, they'll go to the extremes of threatening Delta and Eastern. Well, they say that we'll make sure that Delta goes the way of Eastern Air Lines if you ban smoking, our airlines, meaning we're going to force you into bankruptcy, also because we're going to make sure people don't fly your airline, we're going to make sure all the people we employ don't fly and we're going to -- that goes to the extremes that they're biased and the extremes they'll go to in order to manipulate the science.

THE COURT: Who is the author of the

letter?

MR. ENGRAM: Your Honor, he was identified as a name that was familiar to Mr. Ogden. He did not recognize the memo. He did not take any action, did not write his own letter to Delta in response to this e-mail. You know, he's basically being asked to comment on the state of mind of the author of this e-mail, somebody who was never authorized. There's no suggestion that Mr. Ogden said, well, he was authorized to send this e-mail, he was -- this was a position that RJ Reynolds took with respect to Delta Airlines.

He says -- this was an individual customer of Delta who was a smoker who was opposed to Delta's attempt to extend the ban on smoking. He wasn't happy with the position that Delta was taking. And he wrote a letter that would suggest that that's what it was.

But Mr. Ogden says at page 38, you're suggesting that this letter or e-mail somehow represents the intent of RJR. And I see nothing here that suggests that. This is an e-mail that was apparently sent by one user to

other users on the e-mail system suggesting others join in expressing his concern.

I mean, how do they get to say that that's the position of RJ Reynolds because some employee sent an e-mail out?

MR. WEINSTEIN: It's on their Web site and it's from their people.

THE COURT: It's a big company, though. I don't think that that means that that's the position of the company.

MR. TROP: Rhonda is looking for it, but I think it's directed to all research and development people, which of course is a big company as the Court said. They're mobilizing to let Delta know what's going to happen to them.

THE COURT: I'm not going to let this in at this time. I'll tell you what, mark the whole deposition for ID as a proffer by the Plaintiff. Depending on what is said by this witness in the testimony that I hear that's presented by the Defendant, I may look at it again. Because I don't know what he's going to say.

So I'll look at it again to see whether

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

it changes.
MR. WEINSTEIN: That general idea is what I tried to strike an agreement. Let's put on your video first and then we'll put ours in afterwards, either in rebuttal or by agreement. So I was hoping to reach an agreement.
MR. ENGRAM: You've designated your cross, Mr. Rosenblatt's cross examination from Broin 1. And to the extent that there are parts of that that we haven't objected to, you know, that will come in. But this doesn't address any issue that's relevant in this case.
THE COURT: I'll consider it afterwards. But right now -- I have this copy, but I wrote all over it. If you have another copy to present as your proffer so the clerk can maintain --
MR. ENGRAM: Your Honor, we've marked a copy.
THE COURT: Can you leave it on the clerk's desk? And I'll try to remind her to mark that.
MR. ENGRAM: I gave one this morning

because I think I've already marked on -- I made some of my own notes on this one.
THE COURT: I'm going to tell her with a note.
This is the deposition of February 26th, 2001 of Ogden. What's his first name?
MR. ENGRAM: Michael.
THE COURT: Michael Ogden, it can be marked as a Plaintiff's proffer.
Now can we turn to Stammberger?
MR. ENGRAM: Your Honor, I'm sorry, she did say don't put it up here because you wouldn't know what it was.
That incorporates both our objections that were filed with the Court this morning. I've got a stamp file copy showing today's file date along with the highlighted.
THE COURT: It's the complete deposition?
MR. ENGRAM: Yes. That's the Court's copy.
THE COURT: So assuming that doesn't come in, all the Plaintiff has left is to play the deposition, the trial testimony of Richmond, Dr. Richmond.
MR. WEINSTEIN: That is correct. And I

filed, I guess this may be more for the record, notices for the Court to take judicial notice of the -- of various things, such as -- and ask that it be offered into evidence, some things maybe you will. One is, for example, the Surgeon General's Report of 1986. I know you can take judicial notice of it. And assuming you do, we would offer it into evidence.
THE COURT: There's an objection, right?
MR. REILLY: Sure, I mean --
THE COURT: There was a whole question about whether this was hearsay and an exception to the hearsay rule under the government report.
MR. WEINSTEIN: Absolutely, judge.
MR. REILLY: Not only that, Your Honor, but it is chock full of totally irrelevant information. I mean, the whole thing is about cancer. That's what this is all about. The whole report is about cancer. Why would we all of a sudden be letting such a document into evidence when it's completely irrelevant? I have no problem with if you want to bring out excerpts from it and we'll look at the

excerpts and see whether or not, for some reason, those excerpts should be admitted into evidence like there's an excerpt. But in fact, he's already asked his witnesses. He's asked Dr. Persky and Dr. Burns about the content of it. I don't see any reason why the document should come in now.
THE COURT: Please, let's put this to the side for a moment and let me consider what else you're offering.
MR. WEINSTEIN: All right.
MR. WEINSTEIN: Judge, let me hand to the court. This has been filed to the court.
Can I approach the bench?
THE COURT: Of course.
MR. WEINSTEIN: Judge, I think we will be saving a lot of time if Your Honor will read through it. I know you're a much quicker reader than I am a speaker.
THE COURT: You're asking me to take judicial notice of the 1986 Surgeon General's Report. I'm going to put a question mark. Two, health effects to environmental tobacco smoke report of the California Environmental Protection Agency.

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

MR. REILLY: Same objection, hearsay, completely filled with --
THE COURT: I have no idea what's in that. I have never seen it.
MR. WEINSTEIN: Let me hand to the court.
THE COURT: I can't read a 50-page report and figure out what's going on in there. So what relevance.
MR. WEINSTEIN: This particular report deals with, this is 1999 report of the California Environmental Protection Agency 1999 put out by the National Institutes of Health.
MR. REILLY: Put out by the California --
MR. WEINSTEIN: I just said.
MR. REILLY: It's the report of the California Environmental Protection Agency.
MR. WEINSTEIN: I just said it. And it does deal, as Mr. Reilly appropriately said, stated, that is, it does deal a lot with lung cancer and cancer. But it also deals with, for example, the ingredients, that is, the irritants that are in secondhand smoke.
THE COURT: I'm probably not going to allow this in.

The next thing you have is about the 3,000 claims filed in Dade County. I've already ruled that's not coming in.
MR. WEINSTEIN: But I'm submitting it to the court.
THE COURT: I've already ruled. That's on the record. And then the 1,846 claims about sinusitis, I'm not taking judicial notice of that. And because I'm not allowing that in this case, I'm not really deciding whether it's appropriate to take judicial notice of it. I just don't think it's admissible in this case.
Your record is protected.
MR. WEINSTEIN: I'm only saying I want to bring -- since the Hobart case says you should put in the complaints, I want to be relieved, for the record, of the problem of bringing in a voluminous mound.
THE COURT: I wouldn't let you put in the complaints if you had them here. So I think that protects your position. Even if you had 3,000, whatever number you had, I wouldn't let you put in even one of them. So that's not coming in.

Number 4. I thought I already did all this. Plaintiff request that judicial notice be taken of the above claims. Okay, that's the same as the other one.
MR. WEINSTEIN: You have to remember, judge, judge, that when we deposed Dr. Stammberger, he was also noticed for that one deposition in 1,846 cases. Attached to his deposition was every one of the names of every one of these people. When I cross examined him, and I'm entitled to do that, judge, because the bottom line is, I don't have enough data. There is not enough data.
So I say to him in a very systematic way, I say, doctor, you know you were being deposed and your testimony is being offered in and you are, in fact, testifying for, in cases and your testimony is being used for 1,846 other people or a lot of other people who are complaining of the same thing.
I then say, isn't it true in order to get the data, how would you do that? And it boils down to this, judge, he says --
THE COURT: I don't understand. Closing up the door and putting people inside. You've

already said this many times.
MR. WEINSTEIN: But then I say, listen to the way I worked it in, judge. We're entitled, judge, to broadly --
THE COURT: We're going to go to Stammberger and I'll hear you then. But I've already ruled many times, no reference to this. No reference to the 3,000 complaints, the 1,846 complaints.
The rest of this is all about that. Judicial -- 7, judicial notice is also requested of the airline cabin environment, air quality and safety board of environmental study and Toxicology Commission on Life Sciences National Research Council published by National Academy Press. I don't know anything about this and how it would be relevant either.
MR. ENGRAM: Your Honor, I think what they have to do, I mean, they've not had a witness to lay a foundation with respect to that document. We have a toxicologist that will come in, but I don't think it's an appropriate issue to take up on judicial notice.

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/hmxl0001

THE COURT: I'm not going to take judicial notice. The only thing that I'm really thinking about is what part, if any, of the Surgeon General's Report of 1986 can come in. And certainly certain excerpts can come in. Probably the whole report I'm not going to let in.

MR. REILLY: Judge, just to refresh your recollection, you've preciously ruled that I am committed to show the outline of the Surgeon General's Report that says that --

THE COURT: There are no studies. Okay. So now, I've ruled on those things. Can we go to Dr. Stammberger?

MR. TROP: There were a couple of other issues, judge.

THE COURT: No, let's hear it. After you play Dr. Richmond, I expect you to be resting. So I would like to do it.

MR. TROP: We had some things that we wanted to put into evidence. Here's another matter. We did at the beginning of the case a notice to produce at trial. And we asked the Defendants to produce certain documents. One of them, group of documents being all the

invoices, bills, invoices, et cetera between Shook Hardy and any of the defense counsel and Dr. Torres, who is coming in here to testify. We haven't gotten anything from them yet. We also --

THE COURT: Let's take one at a time. What about that, bills from Dr. Torres?

MR. REILLY: Dr. Torres is coming tomorrow, Your Honor. I'm happy to provide them with copies of those bills.

THE COURT: No, bills to you, bills to counsel, you'll produce those tomorrow?

MR. REILLY: Sure. They already got them.

MR. TROP: To a certain point, that's true.

MR. REILLY: When they took his deposition.

THE COURT: So any additional ones, is that what you mean, anything since the deposition?

MR. TROP: That's correct, unless there were some that weren't certainly produced.

THE COURT: Anything that wasn't produced at the deposition.

MR. REILLY: We'll produce.

THE COURT: That will be produced tomorrow, which is the 12th.

What else?

MR. TROP: The other, they have a video, judge, that they've listed as an exhibit, videotape animation of environmental control system that I understand -- I think it's Exhibit 1932.

MR. REILLY: We're not using it.

THE COURT: So if they're not using it you're not objecting to it.

MR. TROP: I guess we don't need it.

MS. WEINSTEIN: There's another exhibit that they told us they're going to use, by letter of June 10th, Exhibit 346, they're going to use with Rodney Sands. And I don't see that on their exhibit list.

MR. REILLY: You mean on the list of --

MR. ENGRAM: 346? It may not be the Reynolds exhibit list. It may be the PM exhibit list. That's probably on the Reynolds exhibit list.

Your Honor, that's the 19 -- that document has been made available to

Plaintiffs.

346 is the airliner cabin environment air quality safety by the NRC. That in fact, is the '86 report that he wanted the Court to take judicial notice of it.

MS. WEINSTEIN: I didn't know what it was.

MR. ENGRAM: You've got our exhibit list, right, February the 22nd?

MS. WEINSTEIN: I thought that since it came from Shook Hardy it was their 346. It wasn't on their list.

MR. TROP: Judge, the next issue would be back again to the bills with respect to Dr. Torres. I want to put those bills -- I want to get those bills into evidence. Most other trials there's usually some kind of an agreement on that. I don't think I'm going to get it here.

So as counsel mentioned, they were discussed, at least most of them up until the time of his deposition, they were discussed in his deposition. If we don't get an agreement to put them into evidence, I would like to read probably four lines of his deposition

http://legacy.library.ucsf.edu/tid/ahm07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

just to authenticate the bills so we can get them in in our case-in-chief.
Normally we just agree and put them in. They're their bills. I'm not suggesting anything wrong with it. He's not going to deny that he worked the hours. I want to be able to show the jury and put them on the screen and do all that.
MR. REILLY: I'm a little puzzled by -- I've never seen anybody read four lines of a deposition to identify as part of their case-in-chief.
THE COURT: They hadn't previously identified it.
MR. TROP: That's correct.
MR. REILLY: It just seems extraordinary and the witness is coming. I'm going to provide the bills.
THE COURT: Why is this something that's not a matter of cross examination of a witness? And why is this something that you want to put in your case-in-chief?
MR. TROP: Just want to make sure that we're not trying to introduce evidence in their case-in-chief.

THE COURT: Well, does the Defendant object this when Dr. Torres is being cross examined about his bills that Plaintiff in effect reopens their case to offer those bills into evidence?
MR. TROP: That's what I'm getting at.
MR. REILLY: I've never seen anybody do that, Your Honor.
THE COURT: Well, that doesn't matter. Do you have any objection?
MR. REILLY: I think it should be done in the same manner it's always done, which is you cross examine the witness with how much he's been paid. I've never seen the bills go in evidence. And of course the only bills that are relevant are the bills that relate to this case.
THE COURT: Well, they're related to this case, I guess. You're talking about bills for something else?
MR. TROP: There are a couple, not many, but there are a couple of bills for -- he's examined two people for them.
THE COURT: So in other words, to show Dr. Torres's bias that he not only has done

this for the Defendants in this case, but he has examined other Plaintiffs for the Defendants.
MR. TROP: Actually just one other. And I want to be able to show the tremendous amount of money that these Defendants have paid Dr. Torres within the last six months or so.
THE COURT: So you can ask him that.
MR. TROP: I know there's no problem with that. But the bills are descriptive, they show what he's doing. They show reviewing things for tens and tens and tens of hours, yet ignoring other things. I'd like the jury to see the actual bills. It's just kind of a procedural matter. I don't want to have rested our case and them say, oh, you can't show the bills now.
THE COURT: Is there any objection to them showing the bills during their cross examination?
MR. REILLY: I anticipate they probably will show the bills. They're probably going to ask to see the bills and are these the bills and mark them for ID just like any --

THE COURT: Any objection if he puts them on your machine there?
MR. REILLY: I can't imagine what my objection will be.
MR. TROP: So we've taken care of that.
And finally, judge, there are a couple of documents that we want to put into evidence at this point. There are documents that have been given to us pursuant to responses to request for production, but the way -- you've already heard the way they do that, typically is they say, see our Web site. So we've pulled out certain documents that have their Bates stamp on it that prove they came from their Web site. And they fall into a couple of different categories. There is, first with respect to Dr. Stammberger, you've heard all the evidence about how the European doctors, what they've said the European doctors were the first to get into this and they're the real experts at it. We want to show the jury that that's not the case and that's not the reason why they got Dr. Stammberger.
THE COURT: Tell me what you want to offer.

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/hmxl0001

MR. TROP: Documents from their Web site that were produced pursuant to request to produce that show a plan by the tobacco companies to retain European doctors to try to influence -- it's called operation white coat, they had a name for it -- to try to influence the science, because they've already lost the battle with the United States doctors, so they went to Europe and they actually --

THE COURT: Let's see, what are they?

MR. REILLY: This is a fraud, Your Honor.

THE COURT: I don't know. Let me see what they are.

MR. TROP: These are -- they were attached to Dr. Stammberger's deposition; that's how we refer to them. We've listed them for identification in this case as Dr. Stammberger's exhibits.

THE COURT: Have they been marked in this case then?

MR. TROP: For ID, yes.

THE COURT: Tell us the ID designations. Show them to Defendant's lawyers and see if they object.

MS. WEINSTEIN: Plaintiff's 1 M, like

Mary for ID, composite.

THE COURT: Are they all 1 M for ID?

MS. WEINSTEIN: Yes.

THE COURT: Composite exhibit 1 M for ID.

MR. REILLY: I need to see them, Your Honor.

THE COURT: Do you have these marked somewhere?

THE CLERK: Yes, I do.

THE COURT: May I see them?

THE COURT: Now I'm holding in my hand, I guess, what is marked 1 M for ID So I've got them. So it's a bunch of different things.

MS. WEINSTEIN: Judge, if you could pull out the one on the top. It says, public smoking programs of the Tobacco Institute.

THE COURT: The first thing I have is a letter from Covington and Burling.

MS. WEINSTEIN: We can go with that one. In the letter number 1, Nordick Region Witness Project. This refers to the white coat recruits. They met with three of them in December of 1987 essentially to explain the purpose of the project to give the scientists who have been recruited the kind of assurances

that scientists typically want before embarking on a project such as ours and to develop a personal relationship with the scientists.

"Our goal is" -- I'm referring now to page 2 of that letter -- "Our goal is to leave the March training orientation session with seven scientists completely cognizant concerning the science of environmental tobacco smoke and prepared to share that knowledge with others at the industry's request. Our preliminary agenda for the meeting, which is still being refined, should leave ample opportunity for ETS as a public affair as well as a scientific issue."

Going down to the third page of that letter, under number 2. West German Witness Project.

THE COURT: Yes.

MS. WEINSTEIN: This refers to their efforts to cultivate witnesses in Europe to make sure that the views that the tobacco companies want espoused to the public that those are the views of the science that come out.

Next page, United Kingdom witness project.

In other words, this all goes to the -- their efforts to recruit people who are going to be biased. So that they know that these people, you can guarantee that none of these people involved in the white coat project are going to say anything contrary to the tobacco company's position and that they're going to make sure that the views presented of the science whether it supports a link between smoking and health or not, that the views that come out of these seminars or symposiums and so on or in court are always going to be favorable to the tobacco companies.

And that's what they wanted to make sure that they did. And that's relevant to this case because they have a scientist from their company who is going to talk about the studies that he did. And they have a doctor who was from the same area, part of the white coat project. It kind of speaks for itself.

THE COURT: Is there an objection?

MR. REILLY: They're reports, Your Honor. This is an absolute sham.

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

THE COURT: How about starting with the evidence code? What's your objection to this based on the evidence code?

MR. REILLY: Well, first of all, this would be hearsay. Secondly, it is completely irrelevant.

THE COURT: Now, this is a letter written by a lawyer at Covington and Burling. And I take it Covington represented one or more of the tobacco companies? But I don't know that.

MR. ENGRAM: He represented the Tobacco Institute. Not a party to this action. They were dismissed with prejudice from the Broin 1 settlement, as part of the Broin 1 settlement.

Their claim against the Tobacco Institute has been resolved.

THE COURT: Covington represented the Tobacco Institute?

MR. ENGRAM: Yes.

THE COURT: Why isn't this hearsay?

MS. WEINSTEIN: Judge, the Tobacco Institute wasn't a company. It was an organization comprised of various members of the tobacco industry. It was dissolved pursuant to the agreement.

THE COURT: But this is a letter from a lawyer.

MS. WEINSTEIN: It's an admission. It's on their Web site.

THE COURT: The fact that it's on their Web site I don't think is something --

MR. ENGRAM: Your Honor, when she says it's on our Web site --

THE COURT: She's referring to the documents that we've had to file pursuant to the Minnesota AG's case in the Minnesota depository.

And so we have created a Web site, I think it's called RJRT Docs, that have 7 million documents that we were required to produce to that Web site.

It's not --

THE COURT: It's hearsay. I think it's hearsay. I don't see any way around this hearsay. So I don't know about the next documents. Is your objection hearsay to all the documents? I don't know what the others are. We might have to separate these out. But this first part of 1 M for ID, which is a letter dated January 25th, 1988, a long letter

here by a lawyer at Covington and Burling, I'm ruling that that's hearsay. That's not admissible. So I'll hand that back to the clerk. But I need to address these others.

But I really am concerned about getting through the objections to Dr. Stammberger. So let's see how quickly we can get to the rest of this.

Next document that I have I don't know what it is. This is note on a special meeting, I guess, of the UK Industry on Environmental Tobacco Smoke, London, February 17th, 1988.

MR. REILLY: This is not a document of any Defendant in this action. This is not a document that is any way related to this litigation. This document is -- what's the date? '88. It's 14 years old. Just to set -- you know, Your Honor, just to show you how far afield --

THE COURT: It's written, excuse me, by someone named Dr. Sharon Boyse.

MR. REILLY: Dr. Sharon Boyse at that time was an employee of, I think -- yes, it says right here, British American Tobacco, not

a Defendant in this action.

THE COURT: I think this is hearsay.

MS. WEINSTEIN: Judge, British American Tobacco is the parent or almost really sister company of Brown & Williamson, who is a Defendant in this action.

THE COURT: I don't know the relationship. If they agreed to what it is, fine. If there's some issue, then there has to be some proof of what their relationship is. I don't know.

MS. WEINSTEIN: We can do that.

MR. REILLY: Regardless of whether they are --

THE COURT: Are they an affiliated company with Brown & Williamson?

MR. REILLY: They are a related company. I don't want to get too technical in what related is. They are a separate corporate entity. They are not a Defendant in this action.

MS. WEINSTEIN: Judge, in this case, even there was an expert designated, who is not being offered by the Defendants, but his name is Dr. Scott Appleton. He's a Brown &

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

Williamson employee. And he's testified previously that Brown & Williamson and British American Tobacco, as far as he was concerned anyway, were essentially the same. The records were available to him from either company, his research was for both. That was their own witness.

MR. ENGRAM: Your Honor, I'd be very interested in seeing that testimony. Because my understanding, the relationship of BAT is that at some point BAT purchased Brown & Williamson.

MR. McCUE: That's correct, Your Honor.

MS. WEINSTEIN: If you want to revisit that, I can get you all the information on the relationship of the companies.

MR. REILLY: Your Honor, this -- there is no reason --

THE COURT: In 1988 were they a separate company?

MR. REILLY: Not only was it a separate company, Your Honor, but in addition to that, just to give you the back drop, this whole concept that there's any relevance or relationship between the assertions that

they're making and Dr. Stammberger is complete falsehood and they know it.

THE COURT: See, I can't rule on this simple thing as falsehood. It's not up to me to decide what's false and not. It's up to the jury. I have to rule on evidentiary objections. You can't say, well, this can't come in because it's not true. I don't decide if it's true or not true.

MR. REILLY: But I can provide Your Honor with pieces of information which are indisputable, which will immediately clarify for Your Honor that this is specious.

THE COURT: Whether it's specious or not isn't really my concern right now, other than obviously we're looking for the truth here. It looks to me as all these documents are hearsay. Unless there's something from one of the Defendants. They're letters of lawyers and there's another one from Covington and Burling. The fact that it was produced as part of this information from the Minnesota case doesn't mean that it's not hearsay.

I think it's all hearsay. So unless you can show me that there's a particular document

that falls within some exception to the hearsay rule, I don't know -- I don't know how this -- it would seem to me it would be protected by the attorney-client privilege also, although that would be another client if it's this Tobacco Institute that's not a party here.

I don't think -- I think all of this is hearsay. So I'm going to say that all of 1 M is hearsay unless the Plaintiff has something to show to the contrary.

Can we get to Stammberger because it's already a quarter to 4:00 and we have to do this before the jury comes back tomorrow.

MR. TROP: Can I very quickly, in two minutes or less, relate to something very similar.

Tomorrow they're going to have Dr. Torres come up. And you'll hear of course that they met with him for a long time and they supplied him with his research. One of the things they supplied him with was a study by this Dr. Feinstein. And it's one of the few studies on ETS or secondhand smoke, they claim, anyway that are out there. And he

relied on this in formulating his opinions. Dr. Feinstein is one of their people that they've paid over the years. He, by way of background, he's one of the people that said smoking is not related to lung cancer years before that.

We have in response to one of their request for production from their Web site, and this is a Philip Morris document, a document, interoffice memorandum where they refer to Dr. Feinstein and how he testifies so great and he's a great speaker. And it says, bottom line, he's one of our sources.

So I want to be able to show that they gave this Dr. Torres, this what they call research and what is really a plant from the tobacco industry, that they created this through their channels, created this study for purposes like these, gave it to Dr. Torres and helped to convince him that ETS doesn't cause secondhand smoke.

There's several of them, but one of them in particular where Philip Morris calls him our source.

THE COURT: Was that marked in this case;

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

is that marked for ID?
MR. TROP: Judge, that one apparently had not been marked for identification.
THE COURT: Mark it right now.
MR. TROP: It's actually a composite exhibit, which I referred to as the Feinstein materials.
THE COURT: Feinstein materials will be number?
THE CLERK: Plaintiff's 1-AA for ID.
(Plaintiff's Exhibit 1-AA was marked for identification.)
THE COURT: Now, do you want to offer it into evidence or you want to ask Dr. Torres about it or what?
MR. TROP: Both.
THE COURT: Offering it into evidence. Is there any objection?
MR. REILLY: Yes. Hearsay, no foundation.
THE COURT: I don't know what foundation means here. But is it hearsay or does it fall within an exception?
MR. TROP: It's not hearsay. It's authenticated because it came from their Web

site.
THE COURT: Authenticated is not a response to hearsay.
MR. TROP: It is an admission.
THE COURT: You're saying it's an admission because this is a representative of the company and he's -- but, look, okay, the first page here is a memo on Philip Morris stationery, I guess to Craig Fullner, Tom Berelli -- who is Tom Berelli? Is he an employee of Philip Morris? I assume, but I don't know. I mean, if this is a memo from somebody at Philip Morris, I think it comes in as an admission under that rule.
MR. REILLY: Well, Your Honor, while the memo may be --
THE COURT: That's the first thing.
MR. REILLY: Yes, but the part that he wants to read is somebody else's handwriting and it's not authenticated. Nobody knows whose that is.
THE COURT: It's this handwriting?
MR. REILLY: Yes, that's what he wants to read.
THE COURT: You'll have to explain that.

MR. TROP: It was produced to us in response to a request for production for information regarding Dr. Feinstein and the relationship between the tobacco companies --
THE COURT: But that doesn't mean that we know who wrote this and how it got on there, you know. I don't know.
MR. TROP: Judge, I don't know who the author of the memo is either.
THE COURT: It looks like -- this is to Craig Fuller. And it looks to me like the initials are CF, but I don't know. And someone would have to tell me. If this was sent to Craig Fuller, then Craig Fuller wrote this little note on it. And then I guess I would need to know who Craig Fuller is. If you can establish that this was written by Craig Fuller and who Craig Fuller is, I would consider it. But without that I don't know that I would --
MR. TROP: Just to make it clear. Our request, and I'm not quoting it, said, give us all documents that, between the Defendants and -- all contracts, documents, correspondence, et cetera, between or

regarding --
THE COURT: Just because they produced it doesn't mean you can get around the hearsay rule, I don't think.
MR. TROP: Judge, it's --
THE COURT: There's some other letters in here. A letter from someone named Arthur Stevens. I can't tell what stationery it's on. I mean, I'd have to know --
MS. WEINSTEIN: Judge, the handwriting is, in essence, it's the same as if it was typed. Why should there be any difference whether it was typed or handwritten? They produced it saying this is a document that's responsive to your request and that it represents our communications with Dr. Feinstein.
That to me means that whatever is on the page represents their communications to and from Dr. Feinstein.
MR. ENGRAM: It's not a communication to or from Dr. Feinstein.
THE COURT: It doesn't look like it either. Can't you just ask someone? I think you have to lay some predicate about who wrote

http://legacy.library.ucsf.edu/tid/ahm07a00/pdf
Support for this project was provided by the National Institutes of Health through the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/hmxl0001

this and so on. I mean, if there's something here that's on their stationery or is clearly from anybody who is an employee of any of the Defendants and that is speaking about something he has authority to speak about.

MS. WEINSTEIN: It's on their stationery.

THE COURT: Some of it is. But here's something from Feinstein.

MR. WEINSTEIN: Business records.

THE COURT: I don't know if they're business records or not. Is there any stipulation about that?

MR. TROP: It's an interoffice memorandum from Philip Morris.

THE COURT: Was there any stipulation that these are business records? If there is or if you can lay the predicate that these are business records, they can come in that way, too.

You know, there's other aspects of the business records exception. I bet there's a way to get these in, but I think you have to --

MS. WEINSTEIN: Can you tell us how?

THE COURT: No, I think you need to lay

some foundation of who these people are or whether -- I don't know. I don't know what to tell you.

MR. WEINSTEIN: Doesn't the burden shift to them when they produce it to us as part of being their business record?

THE COURT: What did the actual request for production ask for?

MS. WEINSTEIN: Paraphrasing it, I think it asked for any --

MR. REILLY: Why don't you just give it to her?

THE COURT: I've got to get to this other deposition. And if you can find that tomorrow and think about this, this will just continue to be marked for ID What is it now?

THE CLERK: Plaintiff's 1-AA for ID, composite.

THE COURT: That's all the Feinstein material.

MR. REILLY: Your Honor, I would only remind you of your ruling the other way, Mr. Weinstein's agreement that before he attempted to cross examine Dr. Torres about Dr. Feinstein that he would explain to you

what his questions were going to be on that subject. And that he would provide you with a good faith basis for making those assertions. Part of the reason I raise that again is I just heard counsel say that Dr. Feinstein said that smoking doesn't cause lung cancer. That was a position taken by Dr. Feinstein and that Dr. Feinstein has been paid over a million dollars or some large number.

Neither one of those statements is even remotely accurate. And Dr. Feinstein is one of the most respected -- he's now deceased -- but he's one of the most respected epidemiologists in the United States during his tenure at Yale University. And I'm more than happy to -- if they can support something, then, fine -- cross examine him about it.

THE COURT: If you're going to ask a question, who is going to do the cross?

MR. TROP: I am.

THE COURT: So do you intend to ask Dr. Torres some questions about Dr. Feinstein?

MR. TROP: Well, if I can get those documents into evidence I certainly do. I'm

not sure at this point.

THE COURT: Let's have an agreement. I don't know if you made this before. But before you inquire about Dr. Feinstein, if you'd ask to approach the bench and see where we are.

MR. REILLY: Your Honor, I haven't seen the documents that they've proffered to you today.

THE COURT: You can take a look at them.

MR. REILLY: But I believe that mixed in among them is perhaps a newspapers clipping from the New Haven Newspaper that specifically addresses whether or not Dr. Feinstein asserted that smoking didn't cause lung cancer. And it specifically says that Dr. Feinstein never says -- it's talking about Dr. Feinstein authored a paper. There -- it was a paper about detection bias. He's an epidemiologist and he was offering an opinion about whether or not there was a detection bias in smokers and lung cancer. Purely --

THE COURT: What is a detection --

MR. REILLY: That they are detecting lung cancer in smokers more often than nonsmokers

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

because every time a person comes into the hospital they're asking the person are you a smoker. So there was a detection bias.

If you were to ask everybody who had lung cancer, then you'd find out a different number. I haven't read the study myself. It's not important to me because if you read on what they want to say is that that publication was a statement by Dr. Feinstein that smoking didn't cause lung cancer.

But the article itself, the one they'd like to show somebody, the New Haven, Connecticut newspaper article itself says right within the newspaper article that Dr. Feinstein never says that smoking doesn't cause lung cancer.

THE COURT: Okay. I don't know whether Dr. Feinstein said it did or didn't. I just can rule on the hearsay objections. It looks to me like that's hearsay, all of that material. Maybe if it's within some exception, if it does, I need to know what that is from the Plaintiffs.

But I can't spend hours here tonight. We've got to go over this Stammberger

testimony because Mr. Reilly said the other day that the part that the Plaintiff wants to offer is 700 pages or seven hours worth or something like that. Please let's go ahead. I don't want to do anything else right now. I want to do this now. It's 4:00 and we have to do it. I have the deposition in front of me.

The first thing I want to do is take up any objections by the Plaintiff to the designated parts of the Defendant.

Page and line.

MR. WEINSTEIN: Judge, I think the first one that hits me, right off the bat, is if we go to 485, Mr. Reilly asks --

THE COURT: Just let me get that.

MR. REILLY: This isn't an objection you've made, though.

THE COURT: It doesn't have any marking here, but did you make an objection on 485?

MR. WEINSTEIN: Yes, line 4.

THE COURT: Question: Doctor, we are here about environmental tobacco smoke or secondhand smoke, blah, blah. Let me ask you if you have ever been involved in investigating whether or not cigarette smoke

has any impact on the beating or this movement of the cilia?

Okay, what's the objection?

MR. WEINSTEIN: Well, it's the objection is I want to get that, the answer, the question and the answer is not competent. It's bolstering. It's hearsay. It violates the Frye rule; and furthermore, in later cross examination he admits that it's not reliable. And I'll show it to you.

THE COURT: Let me read his answer.

MR. WEINSTEIN: He said someone else did.

THE COURT: It's not completely clear to me, but I think what Mr. Weinstein is saying is that the answer is including hearsay about what Dr. Hoffman did.

MR. WEINSTEIN: And I will prove to you, Your Honor, if you now go to --

THE COURT: Wait a minute. Is that what you're saying?

MR. REILLY: Your Honor, Dr. Hoffman is in the same department in the university at Graz as Dr. Stammberger. Dr. Stammberger is the head of the department. This research work and experts are permitted to talk about

their own research and what the results of their own research is.

And on the next page at line -- we can start at line 21 on page 488 -- I asked him: You were involved in this research? And his answer was: Not in the performance of the study itself, but being the chairman of this department, all papers before they are -- all manuscripts before they go out have to pass my desk. And I -- well -- I think he really says, I guess he did say, he speaks in German as his native tongue, but he says, I well went through the results and the publication of them.

And further on in this testimony he talks about his involvement, Dr. Hoffman's involvement, the results of the study. This is a study done in his own laboratory.

THE COURT: You know, if he based his opinions to some extent on this study, I think he can talk about this study.

MR. WEINSTEIN: First of all, it would be hearsay because he's basing on what someone else told him. It's not peer-reviewed. And, judge, I almost will rest my case, if you go

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/hmxl0001

to 712. Now, when he's cross examined you will find that it's incompetent, because, judge, bottom line, he is asked --

THE COURT: Wait a minute, let me get to 712.

MR. WEINSTEIN: You see at the bottom of 712 on line 22 he's being cross examined, judge, and he's asked: What you did tell us about Dr. Hoffman's research is what you have been told about Dr. Hoffman's research, correct?

And he says: What I read. That's right away hearsay.

But it even gets worse, judge, as you go on.

Because he then goes on and says it's a hypothetical. A hypothetical and he says many -- judge, if you read the next like 5 pages, but listen to this, judge, go to now 718. I'm trying do it very quickly without reading in between.

Page 718, line 13. "Can you off the top of your head and from the study done by Dr. Hoffman, I suppose it is, give us any reason why we should believe that the cilia in

the sinus passages being similar to those in the bronchial passages," that's because Hoffman examined the cilia in the bronchial passage, not in the nose --

MR. REILLY: No, he didn't.

MR. WEINSTEIN: -- would react differently from a long-term exposure to smoke. I never said I had evidence on this. On the other hand, I stated, and I do it again, that I do not have evidence that the cilia in the nose react like this. So to my knowledge, there is no proof, no evidence-based study showing this. If those results would come out and be proven by a series of investigations, for instance, what was recommended today following the criteria, I might well switch. But what I am saying is, there's no evidence at all that exposure to tobacco smoke...

And then he goes on to those others things.

And then it says: And you can't offer us any explanation as to why those issues would have -- would behave differently in response to smoke than the bronchial tissues would?

THE COURT: I think it should be tissues instead of issues.

MR. WEINSTEIN: Correct. So, judge, if you read in between, he said so many things to say it's not even reliable.

Look, judge, it's hypothetical, on page 715 that the question, that the cilia are moving, moving faster because this is a noxious substance that is offensive to human tissue? This is hypothetical.

He says then on 714: And the only observable effect that you are able to testify to of smoke on the cilia is that when exposed to smoke the cilia responded by speeding up or moving the smoke faster than the cilia responded to smoke-free mucus; is that correct?

This is one of the results of the study, so would it appear to you that cilia is telling us something else, many other substances were shown to start with an initial -- I have no way to examine the cilia and I put stress on the fact that this was shown in an in vitro model. So we do not know how and what degree we can transpose this to

the in vitro to reality.

But it would be a common -- the question, but it would be a common sense interpretation, and he says, this cilia moving? He says, this is hypothetical. It hasn't been peer-reviewed. We don't know what the study is. The study is not in evidence from Austria. It's so prejudicial. When he says I'm relying on the Hoffman study that I didn't conduct that I read the study. It's bolstering. It's hearsay. And it's unreliable under the Frye rule because it's not even accepted within the medical community. There's no test about this.

He then goes on and says that -- he even says -- it's what I read. You can't have a doctor give his opinion and he says my opinion is that the cilia doesn't, it's not paralyzed; it doesn't move; it moves faster; it moves slower; and it's done in vitro and it wasn't done on people with sinusitis, he says.

THE COURT: Overrule your objection.

I'm overruling the objection you made to page 485 beginning at line 4 referring to Dr. Hoffman's study.

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

What's the next objection?
MR. WEINSTEIN: Well, that's -- on direct, do we have any others on direct?
THE COURT: Any other objections?
MR. WEINSTEIN: Judge, I might also mention that the Frye test is based on what they call, the Courts should keep out junk science. We got one test; no other tests were made. That's why they require the Court, I request the Court to have a Frye test on whether or not -- well, there is no evidence that this test in which he bases his opinion on is accepted within the scientific community or that the methodology used or the procedure used by Dr. Hoffman, there's nothing there. He just says someone in my department did a study which I read and it's hypothetical.
THE COURT: Was there a request for a Frye hearing back when this case was in front of Judge Hubbart? I mean, I don't know quite how we can have a Frye hearing at this point. You're asking for one on behalf of the Plaintiff to exclude the testimony of Dr. Stammberger. So is it incumbent upon you to show this or is it incumbent upon the

Defendant to show that this is based on --
MR. WEINSTEIN: The law is crystal clear. It's incumbent upon the person who seeks to put the evidence in.
THE COURT: When was the request for a Frye hearing -- I mean, it's a little hard to have a Frye hearing right now in the middle of the case. He's not going to be here. It's all through videotape testimony.
MR. WEINSTEIN: Well, I originally raised Frye.
THE COURT: What does the defense say to support Stammberger's ability to testify? I haven't read the testimony. I don't really know what he says, but I gather a little bit about what he says. And is the only basis for his opinion this Hoffman test or is there something else?
MR. REILLY: Absolutely not, Your Honor.
MR. WEINSTEIN: He's correct there, judge. I'm only talking about his opinion about this test with regard to the cilia.
THE COURT: What is his opinion about the cilia?
MR. REILLY: Your Honor, he was asked:

Are there any studies that examine whether or not the cilia are affected, the cilia in the sinuses are affected by environmental tobacco smoke?
He said: In our laboratory -- in my laboratory we have done studies on that very subject.
And in spite of what Mr. Weinstein said, I forget what page we were at just a moment ago.
THE COURT: 485 is where it first came up.
MR. REILLY: Anyway, if we were at that -- 712. If you were to look at 713, Dr. Stammberger spends quite a bit of time. This is not on my examination now. This is on cross examination. I forget who was asking these questions, because the Plaintiff's lawyers asked questions seriatim. At this point I think it was Phil Gerson who was asking questions of Dr. Stammberger about this Hoffman study. And when Mr. Weinstein says that it isn't peer-reviewed, of course the study was peer-reviewed and published in the peer-reviewed literature.

In addition to that, Dr. Stammberger in the case, a videotape was made of the study that was conducted by Dr. Hoffman.
And in addition to that, this was tissue taken out of live patients by biopsy and experimented with by Dr. Hoffman.
And that's exactly what this study is all about. I took biopsies out of living patients and then subjected -- this wasn't a study limited to cigarette smoke from environmental tobacco smoke or cigarette smoke in some form. It was a study looking at a variety of substances that could impact cilia function. And he did find that there was a reaction by cilia -- and the -- to cigarette smoke and the reaction was that the cilia sped up. It didn't paralyze them. It didn't slow them. It sped their beat up and he found that other substances actually had a deleterious affect on the beat of the cilia actually slowed it or stopped it. And he identifies the substances -- I can't pronounce it -- but it's listed here shortly in that area.
Then on a question by Mr. Gerson, I believe, not me, not by the defense,

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the Industry Documents Library: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

Mr. Gerson asks him, and this is what Dr. Stammberger said was hypothetical, Mr. Gerson said: Well, I guess that means that would make the -- that the acceleration in the beat of the cilia was because it made them -- "The cilia are telling us that they don't like smoke and that when exposed to smoke the cilia begin to move --" that's a question by his co-counsel.

And Dr. Stammberger simply says, well, that's hypothetical. We basically can't talk to the cilia and ask them why they like it or they don't or why they're accelerating or not. But you've asked me to address a question.

So he responds to the question by saying, your idea, Mr. Gerson, is hypothetical. I don't agree with it. I don't think you can come to that conclusion.

MR. WEINSTEIN: Judge, this was a deposition taken without a judge around in direct, in direct he asked him: Is there any studies? And he said: There's a study by judge Hoffman. We made our study at the time.

In an abundance of caution later on we're cross examining on that to prove to the court

that that shouldn't have been admitted.

THE COURT: Where does it show that that was published and peer-reviewed or whatever?

MR. REILLY: It never came up and it isn't up now.

MR. WEINSTEIN: It's not there.

THE COURT: What basis did you say that though, Mr. Reilly?

MR. REILLY: Because I know it's so.

THE COURT: Was he ever asked that?

MR. REILLY: No, he wasn't. And that's not a Frye standard. The Frye standard is not whether or not your research has been published in the peer-reviewed journal.

THE COURT: No, it isn't. But isn't it relevant to Frye standard.

MR. REILLY: It might be that they said, you know, I've come out with a theory I've created from Mars and have I no scientific basis for it. And I've not done any study, nor are there any studies that are done in the normal fashion, which the method of doing the study is what has to be -- or the method of arriving at the conclusion, not the conclusion, has to satisfy a Frye test. It

has to be a generally accepted --

THE COURT: How am I to determine?

First of all, is it timely for the Plaintiff to raise this? If it is, how am I to determine whether Dr. Stammberger's opinion meets the Frye test? How am I to determine that at this time?

MR. REILLY: Judge, first of all, I think he has to make a cogent argument. It's his job to show that we don't meet a Frye standard, number one.

Number two, I think you have to look at, how does Dr. Stammberger arrive at his conclusion? Now, he can report the results of the studies that form or other information, including his own private practice, which is what he talks about at length, as well as his knowledge. And the research that he's doing as well on the topic of chronic rhinosinusitis to determine whether or not environmental tobacco smoke causes chronic sinusitis.

THE COURT: So I take it he comes to the conclusion that it does not.

MR. REILLY: Sure. And he says his opinion is based on a variety of things. And

every one of those things -- and Mr. Weinstein cannot bring to you any basis for saying that these aren't the methods that people employ to arrive at the conclusion, that's what Mr. Weinstein is woefully lacking in this argument.

MR. REILLY: Judge --

MR. WEINSTEIN: Judge, there's nothing about --

MR. REILLY: -- the basis for Dr. Stammberger arriving at his conclusions are in part scientific studies like the one conducted by Dr. Hoffman in his laboratory; in part they are the result of his practice over some 20 something years seeing more than 20,000 people suffering chronic sinusitis. They are in part from the research Dr. Stammberger has done into the effect of overexpression of eosinophil, which are white blood cells circulating the body as a defense mechanism.

I mean, to say that Dr. Stammberger is without foundation for his opinions or to say that he's arrived at them through some nonscientific way for arriving at his

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

conclusions, Mr. Weinstein hasn't offered you a scintilla of information.

THE COURT: Let me ask you something. Did Dr. Stammberger testify in any proceedings thus far?

MR. REILLY: No, he only addresses chronic sinusitis. And this is the first sinusitis case to go to trial.

THE COURT: But he didn't testify in the Broin 1.

MR. REILLY: No. And that's -- I mean, that could take us back to the argument that was being made previously about these documents from the white coat program or project. Those documents are 14 years old.

THE COURT: I just wanted to know if he testified. He didn't testify in Broin 1?

MR. REILLY: No, Your Honor. I learned about Dr. Stammberger because there was an article written by the Mayo Clinic. And it had to do with what is causing chronic sinusitis in the United States today? And the Mayo Clinic is conducting research. I just read the article in a peer-reviewed journal, I think it's called the Mayo Clinic -- I forget

the title of it. But it's a peer-reviewed publication by the Mayo Clinic.

And it simply said that they're doing research that shows or suggests that the reason why people develop chronic sinusitis is because your body is having systemic reaction attacking a fungus that is benign. And our bodies are misinterpreting what's going on. And they, unfortunately, are sending legions of eosinophil to attack the fungus. And they send up a major basic protein, which is a highly caustic material, they successfully attack the fungus, destroy the fungus, but unfortunately, lay down this blanket, this is in the sinuses, lay down a blanket of this highly caustic, major basic protein.

This is what causes this long standing irritation that causes people to have sinusitis chronically over a lengthy period of time.

So I looked at that and I then contacted the Mayo Clinic, or I had somebody contact the Mayo Clinic. And they said, look, we don't get involved in litigation. But there is an outstanding person in the world who might be

interested in getting involved in this. We simply don't do it. And he knows as much about this as we do, because his laboratory in Graz is working with us on this issue.

And so they got in touch -- and it's all here in this transcript -- in, I think it's the year 2000, because this litigation didn't even get filed until the year 2000. This doctor talked to that doctor who talked to Dr. Stammberger in Graz. And he said, sure, I'll talk to them.

THE COURT: Let me go back to the Frye issue.

It seems to me when someone is making a Frye challenge, you have to do more than say we're making a Frye challenge. And then it evolves upon the party who is showing the evidence that it's based on good science. I think you've got more of a burden than just saying we're making a Frye challenge.

MR. WEINSTEIN: Judge, the cases are clear, which says the burden rests on the party who put it in, you know that.

THE COURT: But I think you have to come forward with something indicating this.

MR. WEINSTEIN: I'm giving to you, judge, this experiment -- incidentally, their Dr. Torres says that the cilia --

THE COURT: Fine, there's disagreement.

MR. WEINSTEIN: And almost everybody accepted that. But he comes to this conclusion, the cilia are not slowed down or paralyzed based on what he read from Dr. Hoffman, who we can't cross examine, who is not here and has not been -- there's no evidence of it being peer-reviewed. And then he is even asked, judge, but this experiment was conducted over a relatively short period of time compared to a flight attendant's being exposed to over 23 years; wouldn't agree with that? I would agree.

And again, this is an in vitro experiment. And the background was not to consider what might have happened in someone who was exposed longer. It was planned to find out whether or not there are any detectable or possibly deleterious effects to ciliary activity just that with the certain substance, among these smoke.

THE COURT: Fine.

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

MR. WEINSTEIN: Then he says --
MR. REILLY: What Mr. Weinstein --
MR. WEINSTEIN: He never said I have evidence. He is asked most clearly, give us any reason why we should believe that the cilia in the sinus passages being similar to those in the bronchial passages would react differently to long-term exposure in smoke? And he said, I never said I have evidence for this. On the other hand, I do not have evidence that the cilia in the nose react like this. And I'm reading directly from 718.
So my knowledge, my only -- there is no proof, no evidence-based study showing this. If those results will come out and to be proven by a series of investigations, for instance, what was recommended today following criteria, I might well switch.
In other words, judge, he's saying it, so --
THE COURT: I think that's fine. The jury can assess that.
On your Frye motion I'm going to have to deny your exclusion based on Frye because I don't think that what you've read, which is

from his testimony.
MR. WEINSTEIN: How about this, judge, how long was the whole experiment? I don't know either. But this went on for weeks. I would not be honest if I gave you now a guess. Those data are there. Et cetera.
THE COURT: Fine. He's telling you what he did observe or learn from those experiments. And apparently he doesn't have a conclusive opinion.
Anyway, I'd rather take up, other than the Frye issue, any specific objections.
MR. WEINSTEIN: Can I point out one last thing? It's very short.
So there is no reliable scientific inference that can be -- talking about 717, judge, and you asked me this question.
So there is no reliable scientific inference that can be drawn from the fact that the cilia once the stimulus of the smoke was removed did not appear to have any lasting affects?
If you say it that way this is one of hypothetical conclusions.
THE COURT: Fine.

What other objections are there?
Now, I have in front of me what I think the Defendants have offered. And it's marked in yellow. Is that right?
MR. WEINSTEIN: Virtually other than that objection, I don't think we --
THE COURT: There are some other parts that are marked in blue.
MS. WEINSTEIN: On their direct examination we didn't have any other objection.
THE COURT: Well I'm not sure what I'm looking at here as direct.
MS. WEINSTEIN: What page are you on, Your Honor?
THE COURT: Where does it start?
MR. WEINSTEIN: It starts off with Mr. Hunter. And he's one of five lawyers, you may remember.
THE COURT: Where is the first part that the Defendants have designated?
MR. REILLY: You mean the Plaintiff.
THE COURT: I thought the Defendants were offering this?
MR. REILLY: We did. Your Honor, our

examination begins on page 435 and continues to page 547. It ends at line 25.
THE COURT: And you have this on my copy, it's marked in bright yellow.
MR. REILLY: There are no objections by Plaintiffs counsel.
THE COURT: So is that the first part that you're going to play? Into.
MR. REILLY: That's the part that we're going to play.
THE COURT: What's going to happen after that?
MR. WEINSTEIN: I want to play the cross examination of all of it.
THE COURT: Where does that start?
MR. WEINSTEIN: Starts on 599 with Mr. Hunter. You may recall, judge --
THE COURT: Let me find it. So you want to play that part. And that's marked in yellow. And what's marked in blue? The Defendant's objections?
MR. WEINSTEIN: They objected to all cross examination, judge.
MR. REILLY: Well, we didn't object to all of it, but we objected to a substantial

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

portion of it, that's for sure.
THE COURT: So the direct is all in. The cross, the first objection I see is at page 612; is that right?
Now, does the Defendant want me to consider all --
MR. REILLY: No, Your Honor, you should have objections on -- actually mine shows that we started objections on page 599.
THE COURT: Well, mine isn't marked except yellow.
Tell me where --
MR. REILLY: We started, Your Honor, at page 599 at line 11.
THE COURT: It's not marked here, but I'm marking it now. You have an objection that says, so you have really done nothing since being hired by the tobacco companies to research what's in the literature concerning tobacco smoke, secondhand smoke and health issues?
What's your objection?
MR. REILLY: To the form, Your Honor. This is an argumentative question.
THE COURT: This is cross, right?

MR. REILLY: Yes.
THE COURT: Overruled. It's okay.
As I said, the first one that I have marked is on page 612. So if you have anything before that, let me know.
MR. REILLY: Your Honor, if you go down to page 600, line 4.
THE COURT: 600, line 4.
Question: So you didn't put anything in there about research in the literature. What you are telling me today under oath is that you have done a literature review?
And what's the matter with the form of that?
MR. REILLY: You're not supposed to ask people, remind them you're under oath today and things of that nature. So I objected to the form at the time. I gave Mr. Hunter the opportunity --
THE COURT: I don't see anything wrong with the form.
MR. REILLY: He says what you're telling me today under oath is that you have done a literature review.
THE COURT: That's fine. Overrule the

objection.
MR. ENGRAM: There's some colloquy there, Your Honor, will that come in?
THE COURT: The discussion between Mr. Reilly and Mr. Hunter.
MR. REILLY: Your Honor, we're going to take all --
THE COURT: Any objections taking out the discussions by lawyers?
MR. WEINSTEIN: No.
THE COURT: So we take out line 8 through line 21, right?
MR. ENGRAM: He answers the question at 9.
THE COURT: Sorry, take out line 8, keep in line 9 through 11, he's kind of interrupted there. But line 12 through 21 looks like, I'm talking about secondhand smoke. Now, we're going to take out line 13 through --
MR. REILLY: Your Honor, just so we know, we've taken out all the interchanges.
THE COURT: Let's go to the --
MR. REILLY: Your Honor, if you go to line, page 603, line 12.
THE COURT: Question: What hotel was

that?
MR. REILLY: They want to know where we faxed --
THE COURT: I don't think you need that. What difference does that make? All the stuff about the fax and where was it sent.
MR. REILLY: I object to it as being irrelevant.
THE COURT: It seems irrelevant: 603, line 12 through 23, about where the fax was sent. That's out.
(A discussion was held off the record.)
THE COURT: Okay. So we took out on page 603.
What's the next page?
MR. REILLY: If you go to page 605, line 10. Instead of impeaching the doctor appropriately, Mr. Hunter simply starts asking him questions from his deposition. Do you remember this question in your deposition from November 9th, 2001?
THE COURT: Well, does that refer to something that he just said here that's different?
MR. REILLY: No, it doesn't impeach him

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/hmxl0001

at all.
THE COURT: What does it impeach here? I don't know.
Plaintiff, point me to something that it impeaches.
MR. REILLY: See the prior question: Your testimony is that in all these -- he's asking him what his opinion is based on.
And he says, it's based on your clinical practice? That's on page 604.
Then he says: Right, seeing many patients, thousands of them who were exposed and others who were not exposed to smoking and all having the same kind of disease.
Your question is: In all these thousands of patients you've seen, you've never had one tell you that when they went into a smoky room they had a runny nose and headaches?
I didn't say that. I said I haven't seen one that --
Let me ask you if you remember this question in your deposition, November 9th, do you have any patients that have ever presented to you that say after being exposed to cigarette smoke that they develop a runny nose

or cough and headache?
Answer: No --
THE COURT: So it doesn't impeach anything that he's just said.
MR. WEINSTEIN: Yes, it does. He gave the answer that, not that I would recall. And originally he said, I said, I have not seen one who would...
MR. REILLY: The question is about sinusitis, the prior question is about sinusitis.
THE COURT: Let's see. Your testimony is that all these thousands of patients that you have seen you have never had one tell you that when they went into a smoke-filled room that it caused them a runny nose. And he said, I did not say that. I said, I have not seen one that would contribute or cause rhinosinusitis.
MR. WEINSTEIN: He said, I don't recall in his discovery deposition. And here he's saying that I never had one. There's a difference.
MR. ENGRAM: He's saying no and he's saying no.
MR. WEINSTEIN: No, one he's saying no

and the other said, I don't recall. There's a big difference between no, this never happened and saying, I don't recall it ever happening.
THE COURT: Usually it goes the other way around, but I'll let it in. Overrule the objection.
Usually if you say in the past, I don't recall and you say in the current trial something you do recall.
What's next?
MR. WEINSTEIN: You just have to keep on going to the next question, judge, because they object to everything.
THE COURT: I'm asking the Defendant, what's your next objection? Because I have in my marked copy that the first objection is on page 612. Apparently that's wrong.
MR. REILLY: I can't explain that, Your Honor.
THE COURT: What's your next objection?
MR. REILLY: I object to all of this, but in light of some of your rulings, I'm moving on.
Page 606, line 13, you're not here to say that exposure to cigarette smoke -- he doesn't

understand the question, so he says, I don't get it.
Then he says, are you here to say, doctor, that cigarette smoke cannot be a potential cause of chronic sinusitis?
You know what, I'll withdraw the objection.
THE COURT: Yes, I don't see what's wrong with it.
MR. REILLY: I withdraw my objection on page 607, line 9.
But I do object to this use of the deposition on page 607, line 14 because it doesn't impeach him. Oh, yeah, I remember he was just reading this to him. He didn't give him a copy of the deposition or anything.
MR. WEINSTEIN: It's clear impeachment, judge.
THE COURT: Wait a second.
In his deposition he said I don't know. Did he say, no, it can't be a cause? You know, I think that's impeachment. I think that's okay. Because on line 11 he says was chronic sinusitis by and large? No, at least not to the degree that I would have considered

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

this a major contributing factor.
MR. REILLY: Look at the preceding question, Your Honor, the question that was posed to him on line 7 was: Your patients never complained to you that he had been bothered by smoke? That's the question.
THE COURT: But he can answer the chronic sinusitis.
MR. REILLY: Impeachment is supposed to be about cigarette smoke cannot be the cause of chronic sinusitis. How do you get to that?
THE COURT: In the deposition he said, I don't know. And here at this he seems to say, no, can't be a contributing factor.
What's next?
MR. REILLY: Then I guess I withdraw the objections on the remainder of page 608.
Then I would take you, Your Honor, to page 609, line 12. This starts off, is Mr. Hunter, I don't know where he got this document, Exhibit X1, I guess it is. It's a document in German, which apparently Mr. Hunter couldn't read. And he thought that it meant that Philip Morris was funding research at Dr. Stammberger's hospital or his

university. And Dr. Stammberger was kind enough to read the German and tell him, straighten him out, and tell him that it was a prize among a whole host of other prizes that were available to be won or try to win around Europe. I think it's prejudicial and should be eliminated.
Mr. Hunter simply didn't know German and misinterpreted what the document was all about.
MR. WEINSTEIN: Shows the connection between tobacco and his university.
THE COURT: So Philip Morris has this research prize? Line 17 on 610, this is the -- it translates, the Philip Morris research prize 2002.
MR. REILLY: If you go to 611, line 5, Your Honor, that's where Dr. Stammberger actually translates it for Mr. Hunter.
Line 16 he informs him that this is a European wide prize, that if someone wants to apply to for it, they can.
What Mr. Hunter was trying to do was to show that Dr. Stammberger's university was funded by Philip Morris. He simply didn't

understand what this was about.
THE COURT: I'll take it out.
So from line 12 on page 609 through all of 610 and on 611 to line 15.
MR. ENGRAM: 16.
MR. WEINSTEIN: 16.
THE COURT: 17 actually. So 17.
MR. REILLY: Your Honor, if you go to page 612, line 1. This is an effort by Mr. Hunter, basically to use one of those documents that Mr. Weinstein showed you earlier to suggest to Dr. Stammberger that he was part of an effort -- did you ever ask the tobacco lawyers what efforts its clients had made to associate European scientists --
THE COURT: Where are you reading from?
MR. REILLY: Line 11 on page 612. And then if you go down to line 19, it says, did they mention anything to you about the white coat project?
This has nothing to do with our lawsuit. Nothing to do with Dr. Stammberger and they know it.
MR. WEINSTEIN: Being confronted with their documents --

THE COURT: Do you have any basis to think that he has any information about this or was involved in it in any way? If not --
MR. WEINSTEIN: He was the object of the operation white coat.
MR. REILLY: That is a complete bold face lie.
THE COURT: How do you know that, what basis?
MR. WEINSTEIN: Judge, maybe I'm just using my common sense, but Dr. Stammberger says that American doctors are just as qualified as he is. He says there are 7 to 9,000 American doctors in the United States. And we have a document saying that --
THE COURT: That's not -- that doesn't connect him with it.
MR. WEINSTEIN: That we have; we are going to obtain European, they call it operation white coat to enlist European doctors to manipulate --
THE COURT: When was that?
MR. WEINSTEIN: I have to find the document.
MR. REILLY: You have it.

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

THE COURT: Is that all you have?
MR. WEINSTEIN: Maybe you ought to see the document.
THE COURT: I saw some of it before. You're saying because they had this white coat plan and he's a European doctor that's how you connect him, period?
MR. WEINSTEIN: Yes.
THE COURT: No, I don't think so. So...
MR. REILLY: Your Honor, that line of inquiry goes all the way --
THE COURT: You know, he's asking about how much time he spent with lawyers. I don't see why he can't ask that. Page 612, line 7.
MR. REILLY: But if you read it, if you read the whole thing, it says before you ask --
THE COURT: It seems to me from your counting of your bills that you spent 38 hours and your bills reflect meetings with lawyers in that 38 hours.
MR. REILLY: He doesn't care about the 38 hours.
THE COURT: Does he ask anywhere else

about the time spent in the bill?
MR. REILLY: At the very beginning.
THE COURT: Okay, then we can take this out.
MR. REILLY: This goes all the way to 615, line 1.
THE COURT: So we start up on 615, line 2. And the next objection is at line 11.
MR. REILLY: Yes, why do you think the Mayo Clinic wouldn't testify for the tobacco industry? Not only does it call for speculation, but it would be an argument of an inappropriate question.
THE COURT: Yes, I think that calls for speculation. I'll sustain the objection.
MR. REILLY: Then he asks him about an RJR secret document concerning a trip to Austria. If you start at line 22 on page 615.
THE COURT: Some other document marked X 3.
MR. REILLY: The document is, I don't know what the age of it is for sure, but I'm sure it's at least 14 years old. And Dr. Stammberger says, I have no knowledge of this document, at line 23 on page 616, this is

more of the effort of injecting the white coat project into this case.
THE COURT: I'm going to take that out. If the Plaintiff doesn't have anything else connecting him with this thing that was talked about in the late '80s. I don't think that's fair.
MR. WEINSTEIN: Late '80s.
THE COURT: Is that when the documents were?
MS. WEINSTEIN: But the fact that it was --
THE COURT: Do you have anything connecting him to that?
MR. REILLY: They know exactly.
MS. WEINSTEIN: You asked me a question. The jury should be allowed to hear it, so that they can draw their own conclusions.
THE COURT: I think that's too far-fetched. I think you have to have something connecting him with that. You know, if there was some indication that he was solicited by them, part of this white coat project and so on. But I don't think you have any evidence to that. And just because he's

European, that's the only thing, I don't think that's good enough.
MR. WEINSTEIN: Along with the fact that he admits that there are just as many -- there are many qualified --
THE COURT: You can get into talk about that.
MR. REILLY: Actually, Your Honor, I have a different objection to that.
THE COURT: I'll hear that when we get to it. But let's go. Taking all this out, all the way through 616.
MR. REILLY: 617, line 15, Your Honor.
THE COURT: That's where it ends?
MR. REILLY: That's where it ends for the moment, one question and one answer.
THE COURT: So line 16 is a question. That's still the same issue, page 617, so did the lawyers ever mention to you anything about this European witness program? No.
MR. REILLY: I'm sorry, you're right.
THE COURT: Now we're on another document. What's X 7?
MR. REILLY: Same thing. They're talking about a lawyer named Bradley Brookes in

http://legacy.library.ucsf.edu/tid/ahm07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/hmxl0001

Switzerland.
THE COURT: He says he doesn't know anything about any of this stuff, right?
MR. REILLY: Then he goes back at line 16, he goes back to 1988, were you part of the tobacco industry's West German witness project? He said, I've never heard of it. I don't know anything about it.
THE COURT: You have to have a good faith basis to ask these questions that he has -- that he's connected with all this. You can't get it in otherwise, I don't think.
So we'll take out all of 617, all of 618.
We're still talking about it at 619.
MR. REILLY: Actually, Your Honor, that continues on until 620. Actually it goes on well beyond that.
THE COURT: We're taking that all out.
Go to 621, line 20.
MR. REILLY: It goes --
THE COURT: There's a new question about what research did he do.
MR. REILLY: It goes all the way to -- it actually goes to page 621, line 20.
THE COURT: That's what I said. So we

start up there.
And then the next objection?
MR. REILLY: I don't have an objection until line -- page 622, line 12.
THE COURT: Do you know in this case the judge is going to instruct the jury that they are to presume that exposure to secondhand tobacco smoke causes chronic sinusitis? Did the tobacco lawyers ever tell you that?
THE COURT: And what's the objection?
MR. REILLY: That's an argumentative question. It has no probative value. What the Court is going to instruct the jury to presume is not relevant to this witness' testimony. It has no relevance and it's argumentative.
THE COURT: Well, I think they can ask -- but it has to be phrased, if I take out about what the judge is going instruct the jury, at page 623, line 6, the question is: So is it your testimony that that's not true? And that that means the presumption that they refer to.
MR. REILLY: But, see, Your Honor, this is on video, there's no way to redo it.
THE COURT: You can't redact it.

MR. REILLY: You can't reform the question.
THE COURT: Yeah, you can't reform the question.
MR. REILLY: That's why I objected to it at the time. I objected to the form of the question, so that he could do it. That's why we do this in depositions.
MR. WEINSTEIN: Judge, you can take that out.
THE COURT: So do you want to have --
MR. REILLY: It would be line 12 through --
THE COURT: The rest of that page and then up to where on 623 is out?
MR. WEINSTEIN: 21.
MR. REILLY: 623, line 21.
THE COURT: Is out. Start at line 22.
Question: Have you read the articles by Rebecca --
MR. REILLY: This is an inappropriate use of medical literature. You're supposed to ask the witness, do you find this to be an authoritative source? Do you rely on it? None of those things -- that's why I objected

to it, to give Hunter the opportunity to correct his question.
THE COURT: I agree. I think it has to be recognized as authoritative or it has to be otherwise shown as authoritative.
MR. REILLY: Then if we go to line 7, page 624 it says, in every courtroom of this building in the building where this trial will be held there's a sign that says, totally irrelevant. Ask whether he agrees with the sign on the door.
THE COURT: I never saw the sign. It says smoke from cigarettes is also an irritant to nonsmokers, all that is a sign on the door?
MR. WEINSTEIN: Absolutely. And it's pursuant to -- it's on the 6th floor. It's been there. It's posted as a result of a local ordinance and it's on there. And it says what the Surgeon General says. In the last trial I had, I know you don't care about that.
THE COURT: I've never seen the sign, that's all I've said so far.
MR. WEINSTEIN: On almost every floor.
THE COURT: What's the matter with the

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

form of that question?
MR. REILLY: Well, the problem with the question, Your Honor, is it's totally irrelevant. What's hanging on a sign outside the door of this courtroom has nothing to do with this lawsuit. It has no scientific value. I mean, what a legislature is going to require has no probative value in this case whatsoever, totally irrelevant.
MR. WEINSTEIN: Judge, as a matter of fact, that's also contained within the judicial notice.
THE COURT: So...
MR. WEINSTEIN: It's a big sign, judge.
MR. REILLY: I don't dispute it's a big sign --
THE COURT: But maybe the fact that it's a sign is not relevant. But why can't they ask whether he agrees with this?
MR. REILLY: Well, if the question had been phrased differently, do you agree with the following statement?
THE COURT: Well, but he can just start -- you can start with line 9, just saying it, smoke from cigarettes is blah, blah

and read the whole thing and then say, do you agree with that? And he says basically yes.
MR. WEINSTEIN: So what if they know it's posted here, judge? It's a fact. And they see it. And you're going to tell this jury that they'll base their opinion on their own experience and common sense.
THE COURT: Take out that it's on every courtroom. First of all, I don't think it is on every courtroom.
MR. WEINSTEIN: No, it's in the hall.
THE COURT: This says on every courtroom in the building. We're going to take that part out. We're going to let you start at line 9, which is a quote. But it will just say the thing and then he'll say, do you agree with that? And he'll say, basically yes.
What's next?
MR. REILLY: The next objection is on page 626, line 2. Before this deposition started, I told everybody this deposition is being taken in many cases, but I'm going to object when cases go to trial if you guys try to put in multiple -- try to put in references to multiple cases being filed.

So they asked this question. They told me to jump in a lake.
THE COURT: We're on page 626, line 2. Question: But you haven't looked at medical records of any of the flight attendants involved in this lawsuit, correct? Answer: This is correct. I was not asked to do so.
MR. REILLY: If they had said flight attendant in this lawsuit I wouldn't have had a problem. But it said -- there's only one flight attendant in this lawsuit.
MR. WEINSTEIN: Judge, his position is there's not sufficient data. We then developed the questioning to show that the data is available. The data --
MR. REILLY: Filing lawsuits doesn't create data.
THE COURT: I don't think it does either, but I don't think this reference is such a clear one about how many people there are. I mean, I don't want the reference to the 3,000 or the 1800. I think this is just kind of in passing. I mean, it could kind of slip by. But you haven't looked at medical records of any of the flight attendants involved in this

lawsuit.
I mean, you know, I'll let that in. I don't think there's any further reference to many of them. And it could be understood to be this flight attendant. I don't think that's so bad. So I'll let that in. This is correct, I was not asked to do so.
Okay, anything else there? That's fine.
What's the next one?
MR. REILLY: Go to line 626, line 6, he asks whether or not, did you ask the tobacco companies or their lawyers to give you the studies they have conducted on environmental tobacco smoke and what it does to people? He don't know what studies he's talking about, he doesn't know what studies he's talking about and it doesn't have anything to did with sinusitis.
THE COURT: That's okay, I'll let that in. Overrule the objection.
MR. REILLY: Then at line, excuse me, 627 line 4 he asks him, why did he want his money in a check he could negotiate in an American bank. That's totally irrelevant to this lawsuit.

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

THE COURT: Yes, I don't see what bearing that has on anything.
MR. WEINSTEIN: No argument.
THE COURT: Line 4 on that page to where?
MR. REILLY: Down to line 15 on page 628.
THE COURT: Well, some of it asks about how often he comes here. That's a different subject.
MR. WEINSTEIN: We can go down to line 15, judge.
MR. REILLY: I don't think they really care about why did he come here separate and apart.
THE COURT: The rest of the page did you say?
MR. WEINSTEIN: No to 15.
MR. REILLY: 628, line 16.
THE COURT: So you start at 17?
MR. REILLY: Start at 16, do you smoke?
THE COURT: Oh, the next page.
MR. REILLY: 628.
THE COURT: Okay, but mine the next page is marked at 16 that you have an objection there.
MR. REILLY: I do, but I'm withdrawing

it.
THE COURT: So that's it.
THE COURT: How much more do we have -- I'm going to take a recess.
(A recess was taken.)
THE COURT: Maybe you agreed in my absence to a few things.
Okay. No.
So what page are we on? 628? We finished that. 629.
MR. REILLY: Your Honor, I think we are on 628. And I withdraw --
THE COURT: I have written in, so I think you already indicated you withdrew that.
MR. REILLY: And I withdraw the objections I have until 629, line 7. He asks about steroids and does that have side effects. I object to it as irrelevant.
THE COURT: Where does he first refer to it?
MR. REILLY: Right there at line 7 on page 62. He said, what did you say, steroids, he actually didn't say steroids.
THE COURT: Because it sounded like he had said something.

MR. REILLY: He said they have side effects and he says almost like any drug.
THE COURT: What bearing does this have on anything?
MS. WEINSTEIN: Didn't Dr. Persky testify that he injected steroids into her sinuses at one point?
THE COURT: I think he did.
MR. REILLY: But she doesn't have any, and she's not claiming she has any side effects from steroid therapy. He talks about systemic steroids, for instance, are contradicted in someone who has massive chronic disease like tuberculosis. This isn't about our case.
MR. WEINSTEIN: This is cross examination. You can ask possibilities.
THE COURT: You know, I think this is the way I feel about this. If she had anything connected with steroids, any side effects, or if she had been told about the side effects, it could come in. But without that, I don't think it's relevant. I mean, I don't think she has to have them. If she was told about them, that could go to her mental anguish or

concerns about the treatment and so on. But I don't remember any testimony about -- discussion about steroids.
MR. WEINSTEIN: But, judge, the doctor did testify just like, if I recall correctly, that anything that he did or does he always, like any procedure, he said that he advises of all the ill effects.
THE COURT: Well, I don't remember him saying that about steroids. So otherwise it doesn't have any bearing. So I'll take it out. And she has testified. And she has not said anything about any concern she had about steroids. I don't think it's relevant.
MR. WEINSTEIN: We know she's taking drugs, judge. He said almost any drugs.
THE COURT: She didn't say she had any concern or any side effects.
MR. REILLY: Your Honor, that takes us down --
MR. WEINSTEIN: Hold on, let's make sure we're taking it out. Are we taking out from 7 down?
THE COURT: All the way to the next page.
MR. REILLY: When you get down to line 12

http://legacy.library.ucsf.edu/tid/ahm07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/hmxl0001

it's just exchanges of lawyers and it actually takes us down to line 24 on page 630. I object to that because Mr. Hoppe starts off by saying he represents a portion of the 3,000 flight attendants who are making claims.

THE COURT: I agree, out.

MR. REILLY: And that takes us to 631, line 5.

THE COURT: Where he says I want to ask you questions about four areas?

MR. REILLY: I object to this exchange about does Austria have a Surgeon General? It's totally irrelevant to our lawsuit. Mr. Hoppe has this --

THE COURT: I see. Do you have such a person in Austria? Not with the same name.

MR. REILLY: We're not going to have a discussion later about the Austrian Surgeon General or anything like that.

Where it actually leads to.

MR. WEINSTEIN: Actually it didn't matter, he says they have somebody who is equivalent.

MR. REILLY: What it eventually leads to is discussion of the warnings, which is

totally irrelevant and already ruled on by Your Honor.

THE COURT: I'll take it out.

Actually, that whole page and the whole next page.

MR. WEINSTEIN: Whoa, judge, what about 632 from 16 down?

THE COURT: Well, the only one that I'm letting you refer to so far is the 1986 one.

MR. WEINSTEIN: This goes to his -- judge, this goes to his knowledge, his background and his familiarity with medicine and with conclusions reached by the Surgeon General whether, even if it was '60, '61 or '80 or any Surgeon General Report, we can ask him. We can ask him, are you familiar with Harrison's on Internal Medicine? If he says no, that goes to his expertise.

THE COURT: I don't think so. I mean, I think you have to show it's an authoritative source or whatever.

MR. WEINSTEIN: Judge, you have to acknowledge that the Surgeon General's Report of '79 is an authoritative source.

MR. REILLY: No, she doesn't. He has

to --

THE COURT: Let's see. I'll let you ask the question at 16 -- I don't know, I guess I will. Take everything out on 632, everything out on 633. At line 16 he's asked, are you familiar with the details of the 1979 Surgeon General's Report on involuntary smoking? Your answer would be no. Was there one on involuntary smoking?

MR. REILLY: There isn't one. That's why the fact that he says it is completely wrong.

THE COURT: I thought only '86 dealt with involuntary smoke.

MR. WEINSTEIN: Actually, the next question takes care of that, judge.

THE COURT: If that isn't even correct, why don't we start with the one on 22, line 22: Then again in 1986 there was a report of the Surgeon General. In that report there was a major chapter called, The Health Consequences of Involuntary Smoking. Are you familiar with the specifics of that particular article?

Answer: Not the specifics.

I'll let you ask that one.

What's next?

MR. REILLY: Then, Your Honor, 634, line 4 is all about cancer. National Institutes of Health, are you familiar with that?

NIH has nothing to do with this lawsuit.

You know that that's part of our U.S. government and that they're located in Washington, D.C.?

Yes.

This isn't relevant.

I know that you do some work with cancer. Are you familiar with the United States Cancer Institute?

THE COURT: I'll take all of that out.

MR. WEINSTEIN: Judge, this goes to his appreciation and his knowledge about medicine in general.

THE COURT: I'm going to take it out.

MR. REILLY: Your Honor, he's asked about the Calley PA. And you've already kept that out.

THE COURT: If there's something about it that's related to some questions you're going to ask him, okay. But to just say, are you familiar with this treatise on cancer and that

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/hmxl0001

thing on this and something else on something else, I don't think it's relevant unless it has something to do with the questions that you're going to be asking him.

Here's one.

MR. WEINSTEIN: What are we up to now, judge?

THE COURT: We finished 634. Is there an objection on 635?

MR. REILLY: Yes. He's just handing the book back and forth. Then he says are you familiar with -- this is just a process and all they do is hand stuff to him and say --

MR. WEINSTEIN: But, judge --

THE COURT: At line 7?

MR. REILLY: Right. He hands him the book entitled, Environmental Tobacco Smoke, published in the year 2001. He doesn't ask him if it's an authoritative source. He doesn't ask him anything about it. He just says, are you familiar with it? And he does the same thing all the way down to 636, line 19. Just asks him -- I mean, he doesn't ask him are they authoritative. He says, have you ever read this? You can't do that.

THE COURT: I think that's probably right.

MR. REILLY: This goes all the way over to 637, line 5 where he hands him stuff and says, do you think you should have read this? I mean, that's not what you do about --

THE COURT: I don't think that's the way you cross examine. I agree.

MR. WEINSTEIN: Judge, this is going to be used in almost 2,000 cases. There's no judge there at the time. If you make a statement in court, no, I'm not going to let you ask that question that way. We can rephrase it. That's why this is so unfair and unjust. We're going to be plagued with this.

THE COURT: If you're now saying that they can't raise an objection that wasn't raised at the deposition, you might be right, depending on --

MR. WEINSTEIN: That's what I'm saying.

MR. REILLY: But I did. I raised objections to the form repeatedly. And people ignored me right and left. They said to heck with that guy.

MR. WEINSTEIN: Hold on. You show me

where.

MR. REILLY: Page 637, line 2, I object to the form. But I don't have to object to the form where you're only handing books to people and asking them whether or not this is something you should have read. I don't have to object to the form of that.

THE COURT: Let's see. Is it a form objection? Is it a form objection to say you can't impeach? I mean, you can't impeach him that way? Why isn't that a form objection?

MR. REILLY: Because he has to satisfy, he has to establish that the item is authoritative.

THE COURT: But isn't your objection that he can't ask it in that form, or is it a predicate objection or some other type of objection?

MR. WEINSTEIN: I mean, this is why they tell you --

THE COURT: I don't know if it's a form objection.

MR. WEINSTEIN: This is why they tell you when you take an out-of-town objection.

THE COURT: Please.

MR. REILLY: Your Honor, at the time, there's nothing wrong with him asking have you seen this book before. I can't object to that on form.

THE COURT: Why isn't it a form objection?

MR. REILLY: He can ask the question: Have you ever seen this book before? I can't stop him from doing that based on form objection, but once he establishes that it's somehow relevant to our lawsuit -- what he's done is this is an irrelevant question at this moment. When I was discussing this with you what I did was take another step was in my mind say, what is this guy trying to do? If he's trying to establish that this is an authoritative source.

THE COURT: Relevance objections don't have to be preserved. So why is it relevant to ask him if he knows Ronald Watson or if he knows Dr. Slagley, or if he knows all these people? Why is that relevant? I'm going to sustain the objection.

Now here's a form objection to the question on page 636, line 23.

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the Industry Documents Library: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

MR. REILLY: I think it's a completely argumentative question. Not only that, but it's irrelevant.
THE COURT: But what's the matter with the form? Oh, it's argumentative?
MR. REILLY: Right. You can't hand something to somebody and say, here, you've never seen this before, you don't know what's in it, but don't you think you should have read it?
MR. WEINSTEIN: What's wrong with that? Deals with the subject he's talking about.
THE COURT: Effects of ETS exposure on the nasal cavities.
MR. ENGRAM: I don't think we know what it is, judge. I don't think it's identified as an exhibit.
THE COURT: Is that right, it's not identified here?
MR. REILLY: Well, it's not an exhibit for sure, number one.
Number two, you can't just walk up to people. You can't do it in this courtroom. Your Honor wouldn't permit them to walk up to the witness and say, you've never seen this

before...
MR. WEINSTEIN: The problem is in this courtroom the Court would say, no, you need to do this and we would do it.
THE COURT: I'll sustain it.
MR. REILLY: That goes 637, line 9, the introductory remark by Mr. Hoppe is completely inappropriate. But he goes on to ask him, before I do that, are you a member of the American Academy of Otolaryngology? I definitely think he gets to ask him, are you a member of the Academy of Otolaryngology.
THE COURT: Okay. That's fine. Where is the next objection?
MR. REILLY: Then he says -- you know what he's doing here, Your Honor, he just starts reading. You can't tell this from the transcript. But he has some publication I presume by a Dr. Beninger, and he just starts reading from it, which you can't do. And I object to the form.
MR. WEINSTEIN: Judge, on the video a lot of times it may well be that these books that he's referencing was held up and they're identifiable in the video.

THE COURT: Question at line 19 on page 637. Line 23, the question, it says and then there's a quote. I don't know what the "it" is. I talked to them yesterday and they say they have 8,760 members of which 7,000 live in the United States. What is the "it"?
MR. REILLY: What he's talking about, Your Honor, is how many people are members of the American Academy of Otolaryngology.
THE COURT: What is the "it"?
MR. REILLY: Like I said, what he does is, Mr. Hoppe is sitting there with some publication and he's simply reading from it. And he says: It says -- just like I'm doing right now. He says: It says, I talked to them yesterday and they say they have 8 --
THE COURT: It's got to come out, we don't know what it is or who said it.
So on that page 637, line 9 through 18 is okay.
MR. REILLY: That takes us down to 638, line 6.
THE COURT: Would you agree with me that some of those -- first off, are you aware of the fact that there are certain educational --

what's your next objection?
MR. REILLY: I have no objection to line 7 through 14. And then on line 15 through 18 I object to that as calling for -- as having no foundation.
THE COURT: What proof is there that these colleagues don't agree?
MR. WEINSTEIN: What he's saying, he's saying, are you aware that these colleagues don't agree?
THE COURT: What basis is there that they don't agree? You might be right, but what is there to show that they don't agree?
MR. WEINSTEIN: Judge, we had a doctor talk here, Dr. Persky, who disagrees. All we're doing is the usual type of thing. It's like saying it's not exact, medical science is not exact and other people disagree with you and so forth and so on.
THE COURT: Some of their colleagues, some of the 7600 members of the American Academy of Otolaryngologists agree. I'll let that in. We know at least one of them. That will be okay.
So then we're at what lines now?

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the Industry Documents Library: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

MR. REILLY: That takes us down to -- if you look, Your Honor, what he does is ends up handing him an article by Dr. Beninger and he starts asking him questions about it and I object to it telling Bill Hoppe that that's not the proper way to do this kind of examination. You're suppose to hand the article to him, ask him if he thinks it's authoritative. If he says yes, then you can inquire about it. But he doesn't do any of that. He simply asked him: Do you agree or disagree with statements in this article? He's not laid the proper foundation.

THE COURT: I agree.

MR. WEINSTEIN: Again, judge, let me note for the record, judge, this is -- if I was asking the question, I would have done it differently. And obviously to go back --

THE COURT: He said he objects at line 18 and on page 640. I think the proper way to do this is to show him the article and let him look at it.

MR. WEINSTEIN: Where are we, judge, I'm sorry?

THE COURT: Page 640, that objection by

Mr. Reilly was 18.

Where do you say, this isn't the way to do it, Mr. Reilly?

MR. REILLY: Right there. I mean, I don't go through the entire process for him, Your Honor, but I tell him he's not doing it the right way.

MR. ENGRAM: The first thing he asks him on the bottom of 639, line 23, did you have a copy for him to look at? And he said, well, I'll hand it to you in a minute.

MR. REILLY: He didn't even give it to him. He just starts reading from it. I object to it. Bill Hoppe is a very competent lawyer. He knows what he's supposed to do and not do. I don't have to do more than that for goodness sakes.

THE COURT: I don't think it's the right way to do it. I'll take it out.

MR. WEINSTEIN: So I'm prejudiced by six other lawyers or five other lawyers engaging in this because I didn't go back -- that's why this entire method or procedure --

THE COURT: You could have either consulted with Mr. Hoppe, or I guess you could

have -- if you had these publications and you wanted him to speak to them, I guess you could have asked him.

MR. REILLY: I didn't object one time, Your Honor, to these people asking whatever questions they wanted. If they were asked and answered previously, I never objected.

Your Honor, at page 640, line 24 he asked him whether it causes bronchitis. And in this case you've already ruled that other diseases are irrelevant. And it's on that basis that I objected to it, in this case. In addition to that, the witness is not an expert in it.

MR. WEINSTEIN: How about on 640, is that where we are? What about the first line?

THE COURT: We've already gotten down to line 22, I think. Or line 24.

MR. REILLY: And then I object to the discussion -- in another case in which bronchitis is involved, this is not something necessarily that I would have a basis to object to except maybe as to form or something like that. But this is a case that does not involve bronchitis. This claimant does not claim she has bronchitis.

MS. WEINSTEIN: Judge, in some of the records that were brought before the jury today there was an indication that she did have bronchitis. It may not be a claim in the case that she's seeking damages for, but the question is environmental tobacco smoke had caused bronchitis.

THE COURT: But you're not claiming that.

MR. REILLY: That's my whole point.

MS. WEINSTEIN: But they used that to -- that was shown. They were showing her absences. She was out because she had bronchitis.

THE COURT: But if you're not claiming it, I don't think that you should ask about whether it's caused by ETS.

MR. WEINSTEIN: We could at least mention that to at least show she was out of work. They brought up that she was out of work because of bronchitis. Now we show that ETS causes bronchitis.

THE COURT: You can't amend your claim.

MR. WEINSTEIN: They said she was absent. Rather, they put on --

THE COURT: But if she was absent for

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support for http://www.industrydocuments.ucsf.edu/docs/hmxl0001

having cancer -- you can't amend your claim now to say, well, we're claiming that ETS caused the cancer.

MR. WEINSTEIN: But we can argue that she even brought out that she was out with bronchitis. Hey, we know it does, here's a question here.

THE COURT: That's the problem. I'm afraid we can't stop them hammering now because it's ten to 6:00.

THE COURT: You're not claiming any bronchitis caused --

MR. WEINSTEIN: I'm saying that's a reason for her being out of work and the jury could --

THE COURT: It would be like amending your claim to say -- no, out bronchitis. So that whole page is out.

Where do we go from there?

MR. REILLY: You know, Your Honor, we're back to the Beninger article and I again inform Mr. Hoppe that he's not going about it the right way on line 9 of page 642.

MR. WEINSTEIN: Knowledge that he knows Dr. Beninger.

MR. REILLY: He just starts reading from it again.

THE COURT: I think you've got to have him identify it has an authoritative source or otherwise show it. So I'll take it out.

MR. REILLY: And then that takes us actually to page 643, line 15. And then he says, let me ask you about another otolaryngologist, Dr. Roy Casiano, this professor of otolaryngology here in Miami. Are you familiar with him?

THE COURT: It says Cesarano, but I know it's Casiano from the other case.

MR. REILLY: I think the court reporter got it wrong.

Maybe in a case where Casiano -- maybe it has application, but it's irrelevant here.

THE COURT: Okay, he says he doesn't know him.

MR. REILLY: See, it says you've been furnished with his deposition in some of these cases. This is all completely irrelevant. He wants to talk about things in his deposition. It's okay, you can ask him that in a deposition, but it doesn't make it relevant.

MR. WEINSTEIN: They gave him his deposition.

THE COURT: The problem I see is this, if Dr. Casiano was testifying here, remember this came up before about the Plaintiff was objecting to commenting on the reputation of another expert. And the Plaintiff said, well, you can always -- you can ask another expert if they agree or disagree with the opinion, but, you know -- and I think that's true if it's an expert in the case. But by telling this jury, Dr. Casiano, some person who will not be testifying before them, who is just somebody out there who has -- I happen to know from the other case, who was the expert in the other case, that he has these opinions and say, do you agree or disagree? It's a way of bringing in Dr. Casiano as an expert in this case. He's not an expert in this case. He can't be cross examined in this case. And I don't think you can do it that way.

MR. WEINSTEIN: He was given Dr. Casiano's deposition to consider.

THE COURT: Right. You know what you can do? You can say, Dr. Stammberger, do you

think that sinusitis is a clinical diagnosis or a radiological diagnosis? Then he can answer the question. You can ask him all the questions that you want an answer. But you cannot say, Dr. Casiano, this expert witness who isn't going to testify in the case, thinks this; do you agree with it? Casiano isn't here to be examined. If he was a witness here, it might be different.

MS. WEINSTEIN: Judge, this is one of the flaws of forcing us to do it this way.

THE COURT: No, I don't think so. If you were just taking Stammberger in this case, you wouldn't be able to ask him about Dr. Casiano.

MS. WEINSTEIN: But we'd be asking him a lot of other relevant questions to this case.

THE COURT: You can ask him relevant to this case. You can't ask him about what Dr. Casiano said. He's not a witness in this case. I don't see how you can do that. So I think that takes out everything about Casiano.

You could have asked him about those opinions or what he thinks of it without referring to Dr. Casiano. But I really think the whole thrust of it was to show that he

http://legacy.library.ucsf.edu/tid/ahm07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

didn't agree with Casiano.
MR. ENGRAM: That would take us to 645, line 15.
MR. REILLY: Then Mr. Hoppe does what he did before. He pulls out an article by somebody named John McClane and he starts reading from it. And I make the same objection. I say, you're not doing this the right way. There's a right way to do this and this isn't it. But no one pays attention to me. I feel like I'm talking to my wife.
MR. WEINSTEIN: I hope that would be true of the judge, too, but obviously it's not.
THE COURT: I agree. You can't do that.
We can only last a little bit longer with the pounding.
So nothing -- you can't just show him an article and say, do you agree or disagree? You can't ask him about any other expert who is not testifying in this case. Maybe you can, just based on these rulings, see if there's anything else that could come out here.
MR. REILLY: That takes us to 647, line 7.

THE COURT: Okay, so you have no objection there, right?
MR. REILLY: He asks him about an old study.
I don't know why they want it in. I don't know if they really do want it in.
THE COURT: How many more pages are there to consider?
MR. ENGRAM: 315.
MR. REILLY: I would ask Plaintiff's counsel, truly, do they really care about this?
MR. WEINSTEIN: Well, everything is being cut out so far, with all due respect to the court, we still have to go through it. I mean, I attended that and listened to what other people said and there was objection to form and this and that. And every time, if I came even close to repeating what someone else said I'd hear objection, asked and answered.
THE COURT: Have we gone over your questions?
MR. WEINSTEIN: We haven't gotten to mine.
THE COURT: Let's skip to those now.

MR. WEINSTEIN: I didn't touch on some things that were touched on by others.
MR. REILLY: Well, Your Honor --
THE COURT: Where do yours start?
MS. WEINSTEIN: We started by designating from the discovery deposition on page 383.
MR. WEINSTEIN: Let's go to cross first. Because I designated my discovery.
THE COURT: Where is your cross?
MR. REILLY: It starts on page 801, Your Honor.
MR. WEINSTEIN: Judge, I know you said let's go to mine, but I'd like to go to 701, Mr. Gerson, it's pretty short and I do want all of his questions in for sure.
THE COURT: Let's do yours first.
MR. REILLY: In light of the rules that you've made already, Your Honor, I would presume that Mr. Weinstein would take out --
THE COURT: I want to go over yours now and then on the ones that we didn't reach yet, I want you to go over them to take out anything that resembles the categories that I've already ruled on, or to leave in anything that I've ruled on.

MR. WEINSTEIN: Judge, I need specific rulings on certain matters, because I say to this doctor: You didn't examine anyone, you knew that this, and I talk to him.
THE COURT: That doesn't prevent you from bringing to my attention any area that's different that we haven't gone into yet. But in other words, if some other lawyer says, do you agree with Dr. Casiano? That comes out. If some other lawyer says, here's an article by so and so, do you agree with it? That comes out. That's what I want to go over --
MR. WEINSTEIN: I assumed that that was going to go in because I know about the wide latitude rule in cross examination.
MR. REILLY: Your Honor, let me make a suggestion. You have made a number of rulings. You've made rulings about what is and what is not relevant in this litigation. I am prepared, as I think all the Defendants are, to allow Mr. Weinstein to preserve -- I mean, we know what you've told us. And we know that you've told us repeatedly that he can't talk about 3,000 flight attendant cases. And so to have to argue that again is just

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the Industry Documents Library: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

ridiculous.
THE COURT: I agree, anything that is clear. Then you can proffer everything.
MR. WEINSTEIN: Judge, I mean, I say to this doctor --
THE COURT: Could we do yours now?
MR. WEINSTEIN: That's fine. Where do we start?
THE COURT: On page 801. That's fine. We're going to do all of yours, I'm saying as to all of the others.
MR. REILLY: Your Honor --
THE COURT: So page 801.
MR. REILLY: Your Honor, I object to the first -- I object to the first three pages because they do nothing but talk about 3,000 flight attendants.
MR. WEINSTEIN: That's just reading --
THE COURT: I'm reading it, just a minute.
MR. REILLY: By the way, Your Honor, I now remember that during the course of this deposition Mr. Weinstein proposed that he would waive all form objections. So I didn't have to make any form objections.

THE COURT: He didn't waive the form ones, you say except as to form.
MR. REILLY: Later on, I just remembered, later on Mr. Weinstein tells me that my form --
THE COURT: Right here -- I think everything comes out until line 23 on page 803. Doctor, you are here testifying, you know, you are here testifying on behalf of, giving testimony favorable to the tobacco companies for which they are paying you, isn't that true? You can ask that question.
MR. WEINSTEIN: Just, most respectfully, please, let's go back for a moment.
THE COURT: All the ones before are all the ones about your clients.
MR. WEINSTEIN: Judge, then let's change it to client.
THE COURT: I'll tell you what, you have an option here. If you wanted to read it instead of show it on videotape, we can make the edits. But I don't see how you can -- we can't change what he says on videotape. But if you want to make this in a singular, I'll let you do that.

MR. WEINSTEIN: Judge, how do I know what I'm trying this case today? How do I know that today I'm going to be trying Ms. French's? You want me to ask this doctor -- this is what I'm trying to get at: Doctor -- I want this deposition. We're going to use it in almost 2,000 cases, so please excuse me I'm going to ask this same question every time. You're not saying that my client Lynn French is not suffering chronic sinusitis? No. Thank you. You're not saying my client --
THE COURT: I agree, it's a problem.
MR. WEINSTEIN: I know that I was noticed in 1,846 cases, 600 approximately were mine. So I'm asking about my clients. And that's why I say from day one it is a total injustice for you to prevent me.
THE COURT: I agree that's a problem. And if they objected to you doing it this way.
Wait a minute. Did you object --
MR. WEINSTEIN: Yes.
THE COURT: Where is that?
MR. WEINSTEIN: I'll show you right at the beginning, I objected to the whole

process, judge, and it is clear.
THE COURT: Show me page and line.
MR. WEINSTEIN: Okay.
MR. REILLY: You know what, Your Honor --
MR. WEINSTEIN: He's interfering.
MR. REILLY: Let's tell the judge the whole story.
THE COURT: Let's see what it says on the record, please.
MR. WEINSTEIN: He wants to stop me --
MR. REILLY: You bet I do because you're not telling the courts --
MR. WEINSTEIN: Page 430.
THE COURT: I agree, it's a little bit of a problem for how to do this. Page 430. Okay.
MR. WEINSTEIN: 430 and goes down --
THE COURT: And I see at line 3 you're objecting to this whole proceeding.
MR. REILLY: But look at the reason, Your Honor.
THE COURT: Okay. First of all, I object strenuously to have to be here at 7:00 to have to accommodate this doctor, blah, blah, blah. Then, I don't appreciate at my stage of life

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

having to get up at 5:00 in the morning.
MR. REILLY: This is said in front of the witness, one of the leading authorities in the world on this subject and here is Mr. Weinstein --
THE COURT: Wait a second. Where do you object to this business about multiple clients?
MR. WEINSTEIN: 432. Again, you --
THE COURT: Line?
MS. WEINSTEIN: Line 11.
THE COURT: Okay. I'm reading it.
Line 14, furthermore, it's improper for there to be one deposition of this doctor to be used for some 2500 Plaintiffs, individual Plaintiffs and have seven law firms here and have seven other lawyers ask this witness questions that I may not want to ask them.
MR. WEINSTEIN: Go on, up to line 1 on 433.
MR. REILLY: He didn't have to rely on a single question --
THE COURT: The main thrust of this objection is that these other lawyers would be asking questions, but I think -- he did object

to this proceeding. I think it's a problem here about the use of the plural and how to get around this. Because they did object to taking one deposition for everybody.
MR. REILLY: Your Honor, I suggested to them that all they had to do was say, my client and that would have resolved this problem.
MR. WEINSTEIN: You said that.
MR. REILLY: Sure, I did. I told you.
MR. WEINSTEIN: Show me where you say "my client."
MR. REILLY: Marvin, I told you guys, first of all, before this whole thing started --
THE COURT: Wait a minute. I don't know if you told him that or not, but he didn't do that.
MR. WEINSTEIN: Now I say, so I object to this proceeding. If you want to bring this doctor in and if he wants to fly in from Austria in our 2500 cases --
THE COURT: Just a minute, now. I see your point. And what I want to know is whether the part that I was going to take out

because of the reference to the multiple clients, is there any other place that you basically ask him the same questions? For example, wait a minute.
What I'm trying to find out is -- I'm sorry.
MR. ENGRAM: Your Honor, may I be heard briefly?
THE COURT: Page 801, line 13, question: As a matter of fact, you have no way of knowing whether or not my clients are not suffering from chronic sinusitis; isn't that true?
And he says, that's true.
Now, what I want to know, is there any other place where you ask basically that question which does not refer to all your clients that can come in? So if that comes in in some other place, we don't have to worry about it. If it doesn't that is more of a problem and I'd have to address it.
MR. WEINSTEIN: I also say, you haven't seen any medical reports or data regarding any of my clients? Which ordinarily if we weren't doing this process, I would have said the

medical records of my client.
MR. ENGRAM: Your Honor, may I be heard?
THE COURT: Yes.
MR. ENGRAM: The deposition in the manner and the taking of the deposition was the subject of a motion to quash the notice of deposition that was filed. And this argument was never raised at the time the motion to quash was heard before -- was it Judge Friedman, Ken? Or Postman? I think there were two hearings on the motion to quash.
This issue was never raised. We show up at the deposition, I submit to the court that if was incumbent upon Mr. Weinstein to file a motion to quash the deposition if the procedure -- if he had a problem with the procedure and the fact that it was noticed in 1800 cases.
I mean, we moved forward with the deposition in reliance of the fact that there wasn't any motion to quash. And my understanding is that that's how you oppose a notice of deposition you've got a problem with.
MR. WEINSTEIN: I moved for protective

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

order with two judges. I said it was improper. One, they gave short notice. Then I said it's improper to go there. I made all kinds of arguments, I don't remember specifically what they were. And the judge granted the protective order only for purposes, well, give them more advance notice because they gave us notice one day before to fly up to Minnesota. But I made all the arguments that it was improper for hearings, that it was improper. And I'd like to get the transcripts. I objected strenuously -- I filed motions for protective order. I said, it's improper for one doctor to give testimony. And all he said was, Your Honor, you have to understand this doctor it is, all he's going to do is say that it can't -- he's an expert, a world expert, all he's going testify is that it can't -- sinusitis can't be caused by such and such.

If that's so, what does it matter if there are 2,000 or 3,000 or 1,000 if it can't be. So I'm entitled to ask about my clients. I'm entitled to -- I mean, they chose to take this one deposition and, judge, you see what

is right at the beginning of the deposition and the notice that they gave, pages and pages of the people.

THE COURT: I get it. Just a minute. I'm trying to figure out how to resolve this.

I think you made some objections. I don't think you made a real specific one about this particular thing, but I don't know that you had to, you objected to the whole way that it was being done. And I don't know that you would have had to anticipate all these particular difficulties. I think your objection probably preserves this, although you could have been a little more specific. But the only way I can think of doing it here is to let you read it instead of playing it.

That way you can ask all the questions with the proper editing. Let's see.

MR. WEINSTEIN: Judge --

THE COURT: Maybe if you don't refer to how many clients you have, maybe it's not so bad. Because page 801 -- okay, I'm sorry, page 800. Doctor, my name is da, da, da. I represent various other flight attendants who claim they are suffering from sinusitis, we

don't need to put that in. But at line 7 you are not saying that any of my clients are not suffering from chronic sinusitis, are you? It doesn't say thousands, it says, yes, it could be two clients.

I mean, yes, I don't want the information about 3,000 clients. If it just says clients in the plural, I mean, it could be two, right? Maybe we can let that in. So from line 7 through 16, no, keep going, you haven't seen any medical reports or data regarding any of our clients.

MR. WEINSTEIN: The jury is going to hear other lawyers talking. We know it's only about this client. Jurors aren't that dumb.

THE COURT: I'm going to let that in. You know, as long as we don't get into all these thousands and all of the similar problems they have.

Well, I don't know about line 23. No. Okay.

So I'm going to let in from 7 through 18. Well, no, his answer I guess is through 22. But then out from line 23 and you know where you talk about 2500 or 3,000 cases, keep all

that out. So the whole next page, 802 is out. 803.

MR. REILLY: It's just discussion of lawyers until line 23, Your Honor.

THE COURT: Take that out then at line 23.

MR. REILLY: Then it says --

THE COURT: That's where we were before. Giving testimony on behalf of the tobacco companies, that's okay. Keep that in.

Page 804.

MR. REILLY: I have to tell you, Your Honor, if Mr. Weinstein is going to designate sections of inquiry by other lawyers, then I will object to this as being repetitious. He's already been asked who has he been hired by? Mr. Hunter went all through --

THE COURT: I am going to require that the Plaintiffs do two things. First, review all the other crosses that we haven't discussed. First, to see that if there's anything in there that is clearly something that I have already ruled is excludable, that we don't have the discussion again.

So anything about 3,000 flight

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/hmxl0001

attendants, anything about Dr. Casiano, anything about let me show you this, that and the other thing, anything that is really clear, so we don't have to have that discussion again on all of those.

Then I want you to compare to see if there's any areas in these other cross examinations that are really topics that you covered in yours. Because you'll have to choose which ones you want. And you might want to choose your own or you might not. But you'll have to choose one or the other.

One question here about Shook Hardy, I'm going to let you do it. But if it goes on and it really is repetitious, I'm not going to let you do it. But I prefer you check that out now rather than us going over each page and line of every cross.

The thing I will definitely do, though, is to consider any objections that the Defendants have to your -- the rest of your cross from 804 on. And if there's a way to get around this problem about how many clients you have, I'm going to try to accommodate the Plaintiffs, because I do think that that is

one of the problems with taking this deposition this way wasn't foreseen exactly. But I think that's not fair.

So could you look at it for that and then we'll have to do this again tomorrow? So we'll have at least Richmond, Torres.

Is there a possibility to have some other live witness tomorrow? Or do you think Dr. Torres will take a long time.

MR. REILLY: I don't think he's an all day witness, Your Honor. But I don't know how long he will take. Cross is probably longer than the direct.

THE COURT: What about Teef now?

MR. ENGRAM: Dr. Teef won't be here tomorrow. Dr. Sands we identified as another person to testify.

MR. WEINSTEIN: And he won't have the video?

MR. ENGRAM: No.

THE COURT: What about Dr. Sands? I guess we're going to have to do this some time.

MR. JOHNSON: He's here.

THE COURT: You figure it out. Tomorrow

is Wednesday, we've got Wednesday and Thursday to put on your witnesses, but I will have to spend more time on going over these objections, you figure out when the best time to do that is.

MR. ENGRAM: I hate to bring it up, but we still have to rule on the Ogden Broin 1 designations, too, Your Honor.

THE COURT: Well. That's in this book, too?

MR. ENGRAM: Yes, that's in that notebook, also.

THE COURT: So those are the two things that we have to squeeze in along with the witnesses on Wednesday and Thursday.

Now, tomorrow --

MR. WEINSTEIN: Aren't you happy it was transferred to you, judge?

THE COURT: Tomorrow I can stay a little later, until about this time or slightly later. Tomorrow I can do that.

(Trial adjourned at 6:15 p.m.)

http://legacy.library.ucsf.edu/tid/ahn07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/hmxl0001